Kentucky Law Journal

Volume 93 | Issue 1 Article 3

2004

The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity

Christopher Johnson
Southern Center for Human Rights

The Law's Hard Choice: Self–Inflicted Injustice or Lawyer–Inflicted Indignity

BY CHRISTOPHER JOHNSON*

This article proposes a rule to distinguish between those defense decisions properly belonging to criminal defendants and those properly belonging to their lawyers. In considering how to allocate defense decisions, one finds fundamental values in conflict. Does the respect that a free society must show for the dignity and autonomy of individuals command allocation of defense decisions to defendants? Or does society's commitment to justice through the adversary process command allocation of defense decisions to lawyers? The conflicting demands of dignity and justice in the often high–stakes setting of criminal prosecutions challenge the theoretical coherence of the law. The following case illustrates this painful dilemma.[1]

James Rivers was charged with murder in the beating death of his male roommate. The victim was killed in the apartment the two shared. By the time the body was discovered, Rivers had disappeared. The police focused their investigation on Rivers and found witnesses who gave incriminating descriptions of Rivers's behavior around the presumed time of the killing. A search of the apartment disclosed further evidence implicating Rivers. After his arrest in a distant city, Rivers made incriminating statements to the police.

The prosecution charged Rivers with first–degree murder. In the course of preparing the case, defense counsel found persuasive evidence that Rivers and the victim had a homosexual relationship. After a thorough

* B.A., Carleton College, M.A.L.D., Fletcher School of Law and Diplomacy, Tufts University, J.D., Harvard Law School. I thank Kimberly Kirkland, Landya McCafferty, David Rothstein, Jeffrey Roy, Mitchell Simon, Sophie Sparrow, and Carol Steiker for their careful reading and insightful comments on earlier drafts of this article. Sarah Cure and Rebecca McKinnon provided invaluable research assistance. My greatest debt of gratitude is owed to my colleagues and clients at the Southern Center for Human Rights and at the New Hampshire Public Defender Program, from whom I have learned so much about these difficult issues.

[1] I invented many of the details and all of the names in the scenario, building on an actual case known to me through a colleague.

investigation, counsel believed Rivers had killed the victim during an argument about their relationship, under circumstances possibly supporting a claim of self–defense or, more plausibly, a claim that the killing constituted second–degree murder or manslaughter. Under the law of the jurisdiction, first–degree murder carried a mandatory sentence of life imprisonment without possibility of parole. Second–degree murder was punishable by a term of years, up to a maximum sentence of life imprisonment with the possibility of parole. Manslaughter carried a maximum term of thirty years and a minimum term of probation.

Rivers adamantly resisted the presentation of any defense requiring the revelation of his homosexual conduct. Instead, he demanded that the defense argue that someone else killed the victim. Rivers and his counsel discussed the matter at great length over the course of many months. In those discussions, Rivers consistently denied a homosexual orientation, and denied that his relationship with the victim ever had a sexual component. Sometimes he refused to talk to counsel about the dilemma, apparently finding the topic so embarrassing that discussing it was intolerable, even in the privacy of the jail's attorney visiting room. When he could be induced to consider the question from a strictly tactical point of view, Rivers insisted that the "gay defense" would hurt his cause with the jurors even —indeed, especially—if they believed it. Life had taught him, said Rivers, that the potential jurors in his community harbored such prejudice against homosexuals that they would convict him for that reason alone if they believed him gay.

In short, Rivers opposed counsel's proposed defense, claiming that it would sacrifice truth, dignity, and tactical advantage. Counsel, mindful of the severe punishment for first–degree murder and of the overwhelming evidence of Rivers's involvement, believed the proposed defense both true and tactically advantageous. As for Rivers's dignity, counsel came to appreciate the depth of his client's opposition to the gay defense, but wondered what part of Rivers's dignity would survive an absurd defense, to say nothing of the lifetime of imprisonment in a maximum security penitentiary that would surely follow.

Rivers refused to relent. Understanding the law to give the final decision to the defendant, counsel reluctantly followed Rivers's wishes and asserted the hopeless defense that another person had killed the victim. To avoid disclosing Rivers's homosexual conduct, counsel neither raised self–defense nor introduced evidence that would have supported jury instructions on second–degree murder and manslaughter. The jury convicted Rivers as charged and the court sentenced him to life imprisonment without parole.

Weighty interests were at stake in this defense decision. Rivers's

personal interest in the manner of his defense and in the outcome of his trial favored allocating the decision to him. The community's interest in the sound functioning of the adversary system on which we rely to guarantee, as far as humanly possible, the accuracy of criminal verdicts favored allocating the decision to the lawyer. The dilemma poses two distinct choices. First, the law must choose whether to allocate ultimate control over such defense decisions to the defendant or to the lawyer. Second, if the law entrusts such decisions to lawyers, should the lawyer present the best defense from the perspective of minimizing sentencing consequences, or should the lawyer weaken the defense out of respect for the defendant's attitudes and beliefs?

While recognizing the close relationship between the law's choice and the lawyer's choice, this article offers an argument principally relating to the former. As for the lawyer's choice, in making decisions committed to their discretion, lawyers should carefully consider the defendant's broader interests, and allow those interests to control in the appropriate case, even at the cost of weakening the defense. I leave for another day the difficult and enormously fact–sensitive question of what constitutes "the appropriate case."

As for the law's choice, courts should give represented criminal defendants the right to make decisions opposed by counsel in only two circumstances. First, a defendant may, by deciding how to plead and whether to appeal, insist upon or waive the adjudication of charges in the adversary process. Second, a defendant may, by deciding whether to appear at trial and whether to testify, control his personal participation in a trial. But in all other circumstances, a represented defendant should not be able to undermine the operation of the adversary process by insisting upon a course of action opposed by defense counsel. In sum, nearly all decisions should be committed to the discretion of lawyers.

In proposing that rule, I do not forget the imperfections of lawyers, but take comfort in the possibility of correction through claims of ineffective assistance of counsel. The defendant has a fundamental dignity interest in controlling self–presentation at trial, but that interest is sufficiently vindicated by the defendant's control over decisions about whether to attend trial and whether to testify. I find less force in the defendant's interest in autonomy—in influencing the outcome of trial. For, regardless of the allocation of defense decisions, the ultimate arbiters of the defendant's fate are the judge and the jury, not the defendant or the defense lawyer. Finally, the law should allocate most decisions to lawyers because the community, which after a criminal conviction claims the right to take the defendant's life or liberty, has a great interest in the justice of its claim. Many besides the defendant suffer when courts wrongfully convict or condemn, and our

adversary system relies on the presentation of the best defense to avoid those enormous, irrevocable errors.

Part I examines the theories courts and commentators have advanced to justify or explain a preferred allocation of the power to decide. No theory adequately explains the present allocation because the current law inconsistently allocates decisions. Courts in the same jurisdiction often reach different conclusions about the allocation of a particular decision, and appellate courts have often failed to give consistent guidance to lower courts. Only with respect to the allocation of a few decisions does one find a stable consensus. The prevailing allocation also tends to create, rather than solve, problems by giving some decisions to one actor while giving intrinsically related decisions to the other.

Part II turns from theory to practice by describing how courts currently allocate decision-making authority between defendant and defense counsel. While courts draw different lines between the prerogatives of counsel and those of the defendant, most courts give represented defendants the power to make more decisions than the proposed rule would allow.

Part III evaluates the three most important arguments for ceding control over decisions to defendants. The first, here called the "autonomy intuition," proposes that control over contested decisions follows jeopardy. Control properly belongs to the defendant because it is the defendant's life or freedom, and not the lawyer's, that is at stake. The second, referred to here as the "dignity intuition," proposes that control belongs to the defendant because the law should neither silence people nor prevent them from choosing the manner of their own defense. The third, here called the "reliability intuition," mounts a more direct attack upon the argument favoring lawyer decisions by suggesting that the intervention of lawyers—at least when the intervention works against the will of the defendant—undermines, rather than advances, the truth-seeking function of trial. For the reasons stated in Part III, these three intuitions justify allocating to defendants decisions about whether to invoke the adversary process and about the degree of the defendant's personal participation in the trial. However, the goal of minimizing the risk of wrong results demands allocation of other decisions to lawyers.

Part IV explores two fundamental premises justifying committing decisions to the discretion of defense counsel. The first proposes that the central purpose of criminal trials is to investigate the truth of the charge. The second premise proposes that, in general, lawyers know the best course of defense better than do defendants. This goal of consistency between trial result and truth supports the rule committing most defense decisions to lawyers.

Before beginning, I note that many important questions about the

lawyer–client relationship lie outside the scope of this article. How may the lawyer best win the client's trust and confidence? How should the lawyer communicate bad news about the case? How much should the lawyer involve the client in the decision making process? How can the lawyer contribute to good decision making by the client? This article does not address those matters. Instead, it seeks to answer the following question: in the event of irreconcilable disagreement between lawyer and client about a defense decision, who gets the final word?

One category of related topics involves a lawyer's professional ethical responsibilities. Unquestionably, a lawyer has an obligation to consult with a client,[2] to meet with the client as necessary to the investigation of the defense,[3] and to keep the client informed about developments in the case.[4] Some rules of professional responsibility mandate that the lawyer follow the client's wishes in certain instances, even when those wishes define a course of action the lawyer believes detrimental to the case.[5] To the extent that the canons of professional responsibility conflict with the rule proposed in this article, those canons, and not the rule, should yield for all the reasons set out below.[6]

Another set of related topics involves the lawyer's tactical obligation to build a good working relationship with the defendant.[7] A lawyer who loses the defendant's trust risks not obtaining important information from the defendant, and risks losing the confidence of witnesses who communicate with the defendant and adopt the defendant's attitudes. In order to gain the client's confidence, the lawyer must invite discussion about important decisions in the case, explaining his views about those decisions and giving honest consideration to the defendant's views. Often, the wise lawyer will follow the course preferred by the defendant, even though the lawyer would not do so absent the defendant's preference. So great is the value of a good lawyer–client relationship to the ultimate goals

---

[2] MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2003).

[3] *See id.* at R. 1.1 cmt. s.

[4] *Id.* at R. 1.4(a).

[5] *E.g.*, *id.* at R. 1.2(a).

[6] *Cf.* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 217 (2000) (recommending modification of the ethical rules to clearly allocate authority to present evidence of mental illness to defense counsel, regardless of the defendant's wishes).

[7] *See* Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney–Client Decisionmaking*, 47 U. KAN. L. REV. 1, 32–51 (1998) (reporting empirical research about the extent to which public defenders actually involve clients in decision making).

of representation, and so great are the uncertainties about which course best serves those goals, that a defense lawyer should often take actions urged by the client, but regarded in themselves by the lawyer as errors.[8] However, criminal defendants sometimes demand, after every effort at persuasion and discussion has failed, that their lawyers take actions that those lawyers believe will devastate the defense case. It is that circumstance—the occurrence of irreconcilable differences about critical decisions—that this article contemplates.

A third topic related to the focus of this article, but sufficiently distinct to require separate treatment, involves the status of the rule of *Faretta v. California*.[9] In *Faretta*, the Supreme Court held that criminal defendants, upon satisfying the trial court that they possess a minimum degree of competence, have a constitutional right to refuse legal representation and to represent themselves.[10] This article focuses on the situation of defendants who wish to avail themselves of legal representation but desire to control the actions of their lawyers. When a defendant elects self representation, the problem of conflict between lawyer and client disappears. I do not doubt that a rule ceding control over most decisions to lawyers may motivate more defendants to proceed without counsel, so long as that option remains available to them.[11] The argument that the law should assign more decisions to lawyers, despite the existence of the *Faretta* option, thus depends on certain empirical assumptions.

First, irreconcilable lawyer–client disagreements happen relatively frequently, as evidenced by the sheer number of cases in which appellate courts have confronted the problem, many of which are cited in this article. The problem arises more often in serious cases because the defense must make a greater number of decisions. The problem also tends to arise when defendants distrust their lawyers, a misfortune that occurs either because the

---

[8] *See* Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 799 (2000) (setting out four factors for lawyers to consider in deciding whether to override a client's preference: "the client's capacity for making an informed choice, the reasons for the client's proposed choice, the degree of harm facing the client, and the likelihood of that harm").

[9] Faretta v. California, 422 U.S. 806 (1975).

[10] *Id.* at 835–36.

[11] To some extent, defendants already fire, or at least attempt to fire, their lawyers after disagreements about representation. *E.g.*, United States v. Young, 482 F.2d 993, 994–95 (5th Cir. 1973); United States v. Calabro, 467 F.2d 973, 984 (2d Cir. 1972); United States *ex rel.* Higgins v. Fay, 364 F.2d 219 (2d Cir. 1966); United States v. Williams, 618 F. Supp. 1419 (D. Va. 1985), *aff'd*, 785 F.2d 306 (4th Cir. 1986); People v. Lara, 103 Cal. Rptr. 2d 201 (Cal. Ct. App. 2001); Pacheco v. State, 697 So. 2d 1288 (Fla. Dist. Ct. App. 1997); State v. Ayer, 834 A.2d 277 (N.H. 2003), *cert. denied*, 124 S. Ct. 1668 (2004).

lawyer performs or communicates poorly, or because the defendant is disinclined to trust the lawyer.

Second, I assume that assigning more decisions to lawyers will not induce substantially more defendants to elect self representation, although only careful empirical research could definitively confirm or refute that assumption. I suspect that most defendants who choose self representation do not carefully measure the risks of that choice; they regard any substantial sharing of authority with lawyers as intolerable. Defendants sensitive to the risks of self representation will not choose that option.

Furthermore, *Faretta* has, in recent years, been refined[12] and even criticized,[13] and its rule recently faced a celebrated challenger. Kenneth Starr, former solicitor general, federal judge, and independent prosecutor, recently filed a petition for certiorari asking the Supreme Court to overrule *Faretta*.[14] The Court denied the writ,[15] but there is no reason to think that the controversy about *Faretta* will end.

A fourth related topic involves the special problem presented by defendants with impairments substantial enough to render them incompetent. Others have written about that special case,[16] so it is not given much consideration here. Instead, this article contemplates a defendant who is competent under prevailing legal standards, or even under alternative formulations of competency advanced by commentators.[17] Moreover,

---

[12] *E.g.*, United States v. Farhad, 190 F.3d 1097, 1102 (9th Cir. 1999) (Reinhardt, J., concurring) (finding that the right to self representation must yield when it infringes upon the right to fair trial expressly provided in the Constitution); People v. Dent, 65 P.3d 1286, 1293 (Cal. 2003) (Chin, J., concurring) ("There is much to be said for modifying *Faretta*, at least in capital cases."); People v. Clark, 833 P.2d 561, 631 (Cal. 1992) (Mosk, J., dissenting) (criticizing the right of self representation in capital cases); John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 488–90, 596–98 (1996); Sabelli & Leyton, *supra* note 6, at 226–29.

[13] *E.g.*, Martinez v. Court of Appeal, 528 U.S. 152 (2000) (finding no constitutional right of self representation on appeal); McKaskle v. Wiggins, 465 U.S. 168, 183–85 (1984) (rejecting *pro se* defendant's claim that overzealous counsel violated his right to self representation).

[14] Egwaoje v. United States, 335 F.3d 579 (7th Cir. 2003), *petition for cert. filed*, No. 03–69, 2003 WL 22697568 (U.S. Nov. 6, 2003).

[15] Egwaoje v. United States, 335 F.3d 579 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1712 (2004).

[16] *E.g.*, Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65 (1988).

[17] *E.g.*, Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1389 (1988) (stating that a trial court's determination that defendant's preference for the death

because incompetence further supports the allocation of decision–making authority that this article already recommends, so as not to unfairly strengthen the argument by positing the special case of an incompetent defendant, I generally assume that the irreconcilable dispute arises between a lawyer and a competent client–defendant.

The final related topic not covered herein involves the problem of ineffective assistance of counsel. We read with distressing frequency of lawyers who disgrace themselves and the defense bar by sleeping during their clients' capital murder trials,[18] by appearing drunk in court,[19] or simply by preparing and performing poorly by reason of incompetence, underfunding, or overwork.[20] Though such stories must give pause to those who propose that lawyers should control most defense decisions, several considerations justify proceeding with the argument.

First, no one could seriously propose allocation of decisions to defendants as a remedy for the problem of ineffective assistance of counsel. No one with any exposure to the criminal defense system could seriously entertain the argument that criminal defendants, as a class, exercise better judgment than criminal defense lawyers.[21] Indeed, if that supposition were correct, criminal defense lawyers, as a class, would have little reason to exist. The solution to the problem of ineffective assistance of counsel involves a reconsideration of the rules of *Strickland v. Washington*[22] and

---

penalty is rational should be binding in future litigation).

[18] *E.g.*, Burdine v. Johnson, 262 F.3d 336, 338, 344, 349 (5th Cir. 2001) (finding that a defendant's Sixth Amendment right to counsel was violated when his attorney slept through a significant portion of his capital murder trial).

[19] *E.g.*, *In re* Seely, 427 N.E.2d 879, 879–80 (Ind. 1981) (suspending attorney who appeared approximately one hour late for trial in an intoxicated state).

[20] *E.g.*, Williamson v. Ward, 110 F.3d 1508, 1521–23 (10th Cir. 1997) (overturning capital conviction on habeas grounds because appointed counsel, who received no funding for expert or investigative services and was paid the statutory maximum of $3200, failed to investigate a videotaped statement of another person confessing to the crime); Groseclose v. Bell, 130 F.3d 1161, 1169–70 (6th Cir. 1997) (overturning capital conviction on habeas grounds because counsel failed to call any witnesses, did not cross–examine more than half of the prosecution's witnesses, and made only one objection); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 334, 381–93 (1995).

[21] *See* H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719, 725 (2000) ("[B]y and large, the judgment of the lawyer is greatly superior to the unrealistic projections of the person in peril.").

[22] Strickland v. Washington, 466 U.S. 668 (1984).

United States v. Cronic.[23] However, that must remain the subject of another article.[24] Certainly, one advantage of ceding control of almost all decisions to lawyers, as this article recommends, is to afford courts an opportunity to review the effect of bad decisions on the fundamental justice of the criminal process. There currently exists no mechanism for reviewing the negative effects caused by bad choices made by *pro se* defendants or by those defendants who, although represented by counsel, insist on following an unwise course of action against counsel's advice.[25]

I. PREVALENT THEORIES OF THE ALLOCATION OF DEFENSE DECISIONS

Various theories have been suggested to justify, or at least describe, the current allocation of criminal defense decisions. Those theories take three forms. The first kind of theory makes the relative importance of the decision in question the defining criterion. For example, some courts have ruled that defendants must have the final say in matters of fundamental[26] or constitutional[27] scope. The second type of theory allocates decisions according to the distinct functions of lawyer and client in the adversary process. Defendants retain the power to make decisions about the "ends" of the representation, while lawyers may make decisions regarding the "means" for achieving those ends.[28] The third kind of theory begins by justifying a presumption in favor of either the defendant[29] or the defense lawyer,[30] and permits only limited exceptions to that rule, for which specific

---

[23] United States v. Cronic, 466 U.S. 648 (1984).

[24] See William S. Geimer, *A Decade of* Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 WM. & MARY BILL RTS. J. 91 (1995), for a discussion of the manner in which the United States Supreme Court has undermined the right of an accused to counsel.

[25] *See* Faretta v. California, 422 U.S. 806, 834 (1975) ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel'"); People v. Frierson, 705 P.2d 396, 405 (Cal. 1985) ("When a defendant insists on a course of action despite his counsel's contrary warning and advice, he may not later complain that his counsel provided ineffective assistance by complying with his wishes."); Uphoff, *supra* note 8, at 792 n.156 (discussing cases in which courts have rejected claims of ineffective assistance where evidence showed that the lawyer allowed the client to make a decision that the lawyer could have made against the client's preference).

[26] *See infra* Part I.A.2.

[27] *See infra* Part I.A.1.

[28] *See infra* Part I.B.

[29] *See infra* Part I.C.1.

[30] *See infra* Part I.C.2.

justifications are offered.

No theory describes the existing allocation of the power to decide particularly well. Indeed, no theory could do so; as the case law review in Part II shows, courts have not consistently allocated the power to decide. The most persuasive description of the present disordered allocation appears in LaFave, Israel, and King's influential treatise on criminal procedure.[31] After surveying the law and discovering no coherent principle to account for the present allocation,[32] the treatise's authors conclude that a balance of miscellaneous factors best predicts courts' allocation rulings.[33] Those factors include, among others: "(1) the objective of avoiding disruption of the litigation process; (2) the distinction between objectives and means; (3) the 'inherently personal character' of the particular decision; and (4) the need to foster a strong defense bar."[34]

Theories based on criteria of importance or function suffer an additional flaw beyond their inability to justify or explain the present state of the law. For reasons set forth below, those theories inevitably fail to provide useful guidance to judges in deciding hard questions of allocation. Therefore, the only useful allocation theories are those that first identify either the lawyer or the defendant as the presumptive decision maker, and then provide principled and specific justifications for any departures from that presumption. The succeeding sections of this article discuss the reasons supporting the two presumption–based theories. In the end, I recommend assigning most decisions to lawyers, but find justifications for two sound departures from that assignment.

A. Criteria of Importance

Theories using a criterion of importance to determine decision allocation focus on the nature of the decision. Does that decision implicate constitutional rights?[35] Does it implicate fundamental rights?[36] These theories seek to find some inherent characteristic in a particular decision

---

[31] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.6 (3d ed. 2000).

[32] *See id.* at 595.

[33] *Id.*

[34] *Id.* at 596. *See also* Welsh S. White, *Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67, 71–72 (1972) (noting the test which requires evaluation of the aforementioned factors and diagnosing its flaws).

[35] *See infra* Part I.A.1.

[36] *See infra* Part I.A.2.

and then allocate the decision accordingly.

1. *Constitutional Rights Theory*

Constitutional rights theory holds that only the defendant may waive constitutional rights,[37] but the power to decide all other matters belongs to defense counsel. Some Supreme Court Justices have expressed support for this theory.[38]

At root, the theory reflects the belief that, because the defendant is the party personally at risk, respect for the defendant's dignity and autonomy requires that the defendant control matters of constitutional significance within the potentially life–altering crisis of a criminal trial.[39] Justice Brennan, in *Faretta*, forcefully stated the relevant intuition:

> [t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."[40]

When discussing arguments for making the defendant the presumptive

---

[37] *See* Brookhart v. Janis, 384 U.S. 1, 7–9 (1966) (stating that only the defendant may waive his constitutional rights); Townsend v. Superior Court, 543 P.2d 619, 624 (Cal. 1975) (noting that counsel may not waive a defendant's constitutional right to a speedy trial over the defendant's objection).

[38] *See, e.g.*, Estelle v. Williams, 425 U.S. 501, 527 (1976) (Brennan, J., dissenting) (stating that Fay v. Noia, 372 U.S. 391, 439 (1963), "required that the decision not to assert most constitutional rights be the informed choice of the accused himself rather than of his counsel").

[39] *See* Michael Mello, *The Non–Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 507–08, 511–14 (2000) (arguing that the use of the mental defect defense by Theodore Kaczynski's lawyers, over his objection, violated Kaczynski's constitutional rights and denied him basic human dignity and autonomy).

[40] Faretta v. California, 422 U.S. 806, 834 (1975) (quoting Illinois v. Allen, 397 U.S. 337, 350–351 (1970) (Brennan, J., concurring)).

decision maker, this article examines the considerations of dignity and autonomy that support the assignment of decisions to defendants.[41] Here, the concepts of "fundamental" and/or "constitutional" rights give those considerations practical application in deciding which specific decisions should belong to defendants.

Several features of the constitutional rights theory deserve notice. First, if rigorously applied, the theory would radically alter present judicial practice with respect to decision allocation. A great many decisions now generally assigned to lawyers would have to be reassigned to defendants. For example, the Sixth Amendment guarantees criminal defendants the right to confront prosecution witnesses.[42] Courts have long understood this right to include the right to cross–examine witnesses.[43] Thus, a defendant who does not cross–examine a prosecution witness thereby waives the constitutional right of cross–examination. Nevertheless, decisions about whether and how to examine adverse witnesses generally fall within the province of the lawyer.[44]

In fact, the pervasive constitutionalization of criminal procedure over the last fifty years has given a great many trial decisions constitutional roots. Many elements of a trial, including decisions about peremptory challenges in jury selection,[45] whether to call certain witnesses to testify,[46] whether to appeal the erroneous admission of expert testimony,[47] challenges

---

[41] *See infra* Part III.

[42] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[43] *See, e.g.*, Brookhart v. Janis, 384 U.S. 1, 3–4 (1996) (noting that the "confrontation guarantee of the Sixth Amendment [includes] the right of cross–examination"); Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross–examination.").

[44] *See infra* Part II.B.3.

[45] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994); Powers v. Ohio, 499 U.S. 400, 404, 415–16 (1991); Batson v. Kentucky, 476 U.S. 79, 84 (1986).

[46] *See* Morgan v. United States, 304 U.S. 1, 18–20 (1938) (implying that the right to present evidence is essential to due process).

[47] *See* Smith v. Murray, 477 U.S. 527, 531–32 (1986) (holding that petitioner's underlying constitutional claim regarding admission of psychiatrist's testimony was waived when counsel failed to assign such error on appeal).

to hearsay testimony,[48] and even basic rules of discovery,[49] have acquired a significant degree of constitutional regulation. Most authorities concur in assigning all of these decisions to defense lawyers.

One problem with the constitutional rights theory is that it would require reassignment of certain decisions to defendants which, for reasons of efficient trial management, courts are highly unlikely to take from lawyers. Criminal trials would become administratively unwieldy if, every time a lawyer made a decision in a courtroom about whether or not to question a witness, the court had to consult with the defendant to confirm his or her acquiescence to the lawyer's decision. But because decisions of whether and how to question witnesses implicate a defendant's constitutional right of confrontation, under the strict constitutional rights theory, such decisions would have to belong to the defendant.

Some authorities advocate large–scale reassignment of decisions to defendants, even to the point of making defendants the presumptive decision makers.[50] Those authorities tend to disdain considerations of efficient trial administration.[51] The theory that presumptively allocates decisions to defendants has substantial strengths, and a section of this article evaluates it.[52] The constitutional rights theory tends to merge with that theory in effect, but without that theory's chief virtue. Theorists giving defendants presumptive control justify their allocation as protecting defendants' dignity and autonomy. Constitutional rights theory, however, assigns decisions about constitutional rights to defendants even when the right in question has no significant implications for their dignity and autonomy. It also assigns decisions to lawyers, even when the defendant's dignity *is* implicated, as long as the right in question has no constitutional root.

Perhaps the best example of the constitutional rights theory's

---

[48] *See* Crawford v. Washington, 541 U.S. 36 (2004) (holding that the Confrontation Clause bars the use of testimonial hearsay by a non–testifying declarant); Williamson v. United States, 512 U.S. 594, 605 (1994); White v. Illinois, 502 U.S. 346, 352–54 (1992); Richardson v. Marsh, 481 U.S. 200, 206 (1987).

[49] *See* Wardius v. Oregon, 412 U.S. 470, 471–72 (1973) (noting that state law discovery rules have a federal constitutional dimension).

[50] Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 201–04 (1978); *see also* Richard H. Chused, Faretta *and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CAL. L. REV. 636, 636, 651, 653–54, 664 (1977); Alex J. Hurder, *Negotiating the Lawyer–Client Relationship: A Search for Equality and Collabotation*, 44 BUFF. L. REV. 71, 79–80 (1996); Mello, *supra* note 39, at 507, 509–12.

[51] *See* Hurder, *supra* note 50, at 83, 95.

[52] *See infra* Part III.

shortcomings involves the question of waiver of the Sixth Amendment right to a speedy trial.[53] Some jurisdictions, by rule or statute, have enacted specific guidelines to give definite meaning to the right to a speedy trial.[54] Under the constitutional rights theory, the lawyer may waive a defendant's *statutory* right to a speedy trial, but the defendant retains the right to make decisions affecting his *constitutional* right to a speedy trial.[55] To make the matter more complicated, the Sixth Amendment analysis makes relevant the cause of the delay, and particularly whether the defense caused any part of it.[56] Therefore, under the constitutional rights theory, every decision about whether to seek a continuance of trial belongs to the defendant because those decisions affect the analysis of the constitutional speedy trial claim. Moreover, because statutory speedy trial rights set definite periods within which a trial must begin, the lawyer retains the power to waive the defendant's better claim to absolute dismissal of the charges, but not the less advantageous—and often less applicable—constitutional claim. At least one court has expressly so held.[57]

In itself, radical alteration of the current practice of decision allocation is not necessarily bad; present practice, as described in Part II, needs revision, at least if consistency, predictability, and justice are desired. Indeed, this article proposes an alteration of present practice that is, in some respects, radical. Therefore, it speaks poorly of the constitutional rights theory that courts have not, by using it, achieved consistency or predictability.

2. *Fundamental Rights Theory*

The fundamental rights theory reformulates the criteria of importance to limit a defendant's decisions to those regarding "fundamental" or "fundamental constitutional" rights rather than *all* constitutional rights.[58]

---

[53] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

[54] *E.g.* N.D. CENT. CODE § 29-19-02 (Supp. 2003); N.C. GEN. STAT. § 15-10 (2003); VA. CODE ANN. §§ 19.2-243 (2004).

[55] Barker v. Wingo, 407 U.S. 514, 529–31 (1972); *see also* Doggett v. United States, 505 U.S. 647, 656–58 (1992); Klopfer v. North Carolina, 386 U.S. 213, 219, 222 (1967).

[56] *Barker*, 407 U.S. at 529–31; *Doggett*, 505 U.S. at 656–58.

[57] Townsend v. Superior Court, 543 P.2d 619, 781–82 (Cal. 1975). *But see In re* Horton, 813 P.2d 1335, 1342 (Cal. 1991) (rejecting constitutional rights theory).

[58] *See In re* Horton, 813 P.2d at 1348 (Mosk, J., dissenting) (arguing that only defendant can waive *fundamental* constitutional rights); Anne C. Singer, *The Imposition of the Insanity Defense of an Unwilling Defendant,* 41 OHIO ST. L.J. 637, 667 (1980) (suggesting that the defendant should have power to decide about his fundamental constitutional rights, such

This reformulation avoids some of the previously discussed problems. Decisions concerning nonfundamental constitutional rights remain with the lawyer.[59] But a new problem arises: what makes a particular right "fundamental"?

One possible interpretation defines a fundamental right as one that is "crucial to the accused's fate," which presumably indicates that the right determines or substantially influences the outcome of the case.[60] Two difficulties immediately appear. First, a decision that determines or influences the outcome of one case may play no important role in another case. For example, the decision to call a particular witness may substantially influence the outcome of a case when the witness's testimony is important, but not when the witness's testimony is cumulative or unconnected to the central issues of the trial. Some decisions, such as which witnesses to call, are only occasionally outcome determinative. As a result, judges face the problem of allocating such decisions on a case–by–case basis.[61]

An even greater objection to the "outcome–determinative" interpretation is that it will often not be apparent, at the time a decision must be made, whether that decision will determine or substantially influence the outcome of the case. Thus, even in principle, judges attempting to apply the outcome–determinative interpretation of "fundamental" frequently cannot know, at the moment they must allocate a decision, how to do so. Taken together, these two problems render the outcome–determinative interpretation of "fundamental" unable to deliver either timely or definitive guidance.

A second interpretation defines "fundamental" by reference to some independently defined value. For example, a court could define as fundamental those rights having a direct and important connection to the dignity and autonomy of defendants. If taking a particular decision from a defendant constitutes an intolerable affront in a civilized society that respects the dignity of individuals, then the court must leave that decision with the defendant.

One potential problem with this interpretation lies in the ambiguity of

---

as whether to employ an insanity defense).

[59] *See* Singer, *supra* note 58, at 667.

[60] Uphoff, *supra* note 8, at 797 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE §§ 4–5.2 (3d ed. 1993)).

[61] *See id.* at 796–97 (noting that many decisions could be critical to the outcome of the case); Uviller, *supra* note 21, at 769 (noting problems with "outcome–determinative" definition of "fundamental").

its standard.[62] Which decisions, in the criminal trial context, must a court leave with the defendant out of respect for the defendant's dignity? Because this interpretation makes this criterion substantially identical to the theory that makes defendants the presumptive decision makers, I address it again in Part III.

Finally, two judicial formulations of the fundamental rights theory deserve mention. First, in *State v. Hereford*[63] the Wisconsin Court of Appeals confronted the question of whether a defendant must personally decide whether to seek a change of venue, thereby waiving the constitutional right to trial in the jurisdiction in which the offense occurred.[64] The Wisconsin court combined the two approaches described above in its attempt to define "fundamental" rights. It considered whether the right in question was potentially outcome–determinative by asking whether waiver of the right lowers the accused's protection from conviction.[65] The court also spoke about preventing oppression of the accused by the State,[66] thus justifying its approach as a safeguard for the defendant's dignity.

The California Supreme Court formulated the fundamental rights theory somewhat differently in *Townsend v. Superior Court*.[67] It proposed to identify a right as "fundamental" according to whether the decision involved substantial or procedural matters.[68] Of course, this formulation simply directs the inquiry toward the different, but still difficult, task of distinguishing matters of substance from matters of procedure, to which this article now turns.

B. Criteria of the Function of Defendant and Counsel

An alternative approach begins not with the inherent nature of decisions, but with a description of the essential roles of counsel and defendant in the attorney–client relationship. The most common

---

[62] *See* White, *supra* note 34, at 71 (noting disagreement among courts about what rights are fundamental for this purpose).

[63] State v. Hereford, 592 N.W.2d 247 (Wis. Ct. App. 1999).

[64] *Id.* at 251–52.

[65] *Id.* at 252.

[66] *Id.* at 251–52.

[67] Townsend v. Superior Court, 543 P.2d 619 (Cal. 1975).

[68] *Id.* at 627 (Mosk, J., dissenting) ("[T]he question before us is whether counsel forfeited 'a substantial right of his client contrary to express instructions.'"); *see also* Uviller, *supra* note 21, at 769–70 (suggesting that the definition of "fundamental" is keyed to the "factual predicate of the defense").

formulation of the roles assigns to the defendant the power to decide the ends of the representation, and reserves to the lawyer the power to decide the means by which to pursue those ends.[69]

Specific defense decisions, then, are allocated according to whether they involve the objectives of the representation or merely the means of achieving those objectives. In 1972, Welsh White explained the ends/means test as requiring allocation of decision–making responsibility to attorneys "unless the defendant can sustain the burden of proving that the choice not to assert the claim was made for reasons that relate to the ends to be obtained in the lawsuit, rather than to the means used to obtain those ends."[70]

The ends/means theory, however, has come under significant criticism.[71] Its chief flaw lies in the difficulty of distinguishing the means from the ends.[72] The test has been described as "vague and unhelpful in determining whether the lawyer or the client ultimately has the right to make a particular strategic decision."[73] Another authority observes that the ends/means distinction "is not as coherent as it might initially appear" because "many decisions can easily be characterized both as strategic ones regarding means and as fundamental ones regarding objectives."[74] For example, the decision about whether to call a particular witness would ordinarily seem to be a tactical decision involving the means to obtaining acquittal. But in some cases, defendants may care very deeply about such decisions for reasons having nothing to do with the tactical value of the witness's testimony.[75]

---

[69] *See* Don v. Nix, 886 F.2d 203, 207 (8th Cir. 1989) (finding that, under the ends/means theory, counsel can only make strategic decisions that are "faithful to defendant's basic elections"); *see also* People v. Hattery, 488 N.E.2d 513 (Ill. 1985) (holding that a defendant's decision to plead not guilty bars lawyers from conceding guilt in argument, even if the lawyer is motivated to try to gain credibility for capital sentencing).

[70] White, *supra* note 34, at 74–75.

[71] Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 569–70 (1993); LAFAVE ET AL., *supra* note 31, at 596; Joel S. Newman, *Doctors, Lawyers, and the Unabomber*, 60 MONT. L. REV. 67, 87–90 (1999); Sabelli & Leyton, *supra* note 6, at 182–83 & n.56; Uphoff, *supra* note 8, at 777 & n.57.

[72] Bonnie, *supra* note 71, at 569; LAFAVE ET AL., *supra* 31, at 596; Newman, *supra* note 71, at 87–90; Sabelli & Leyton, *supra* note 6, at 182–183 & n.56; Uphoff, *supra* note 8, at 777 & n.57.

[73] Uphoff, *supra* note 8, at 777.

[74] Sabelli & Leyton, *supra* note 6, at 182.

[75] *E.g.*, Uphoff, *supra* note 8, at 763 (giving an illustration of a defendant who did not want his father to testify out of concern for his father's health, despite the fact that his father's testimony would help his defense).

The Rivers case, discussed earlier, illustrates the difficulty of applying the ends/means distinction. In one sense, Rivers and his lawyer agreed on the ultimate end of the representation—the minimization of sentencing consequences to Rivers, by acquittal if possible. Their disagreement centered on whether the "gay defense" best served that goal. Viewing the matter in that light, one would assign the decision to the lawyer.

In another sense, however, the dispute seems to implicate Rivers's ultimate goals. Rivers also opposed the defense, regardless of its tactical strength, out of a desire to protect himself from what he conceived to be its humiliating content. Insofar as avoiding any humiliation of the defendant constitutes an independent goal of the representation, that motivation makes the question one of ends, rather than means, and so supports giving the decision to the defendant.

The lawyer, however, may admit that avoiding humiliation of the defendant constitutes a valid and distinct goal of the representation without conceding that the decision at issue—what defense to present—implicates that goal. The lawyer may say, "I accept avoidance of humiliation of Rivers as an end, but the humiliation inherent in presenting the alternative and possibly absurd defense, and its inevitable consequence of imprisonment for life without any hope of release, will bring Rivers greater and longer humiliation than will the gay defense." In short, the lawyer proposes, as the best means of minimizing Rivers's humiliation, the presentation of the defense Rivers abhors. Rivers may answer that the lawyer misdefines the end. "My true end," he might say, "is not the avoidance of *any* humiliation, but avoidance of humiliation by the gay defense itself." Still, his lawyer has a reply. "By that alternative formulation Rivers has just begged the question; the decision implicates the ends of the representation simply because Rivers now says that it does."

A principal flaw in the ends/means analysis is that such arguments may revolve endlessly. Another flaw appears upon consideration of the difficult task the ends/means analysis imposes upon the judge. How likely is it that even the best trial judge will be able to discover, during a formal, in-court colloquy with a stressed and inarticulate defendant, the fundamental source of the defendant's opposition to counsel's representation preferences? The whole case will come down to whether Rivers happens to mention his strategic or dignity concerns when the court demands of him a reason for his rejection of his lawyer's advice.

C. Criteria of Departures from a Presumed Decider

The final species of allocation theory begins by arguing for the selection of either the lawyer or the defendant as the primary decision

maker. Such theories then identify specific decisions that should be assigned away from that decision maker. For those exceptional assignments, the theory provides specific justifications.

1. *The Defendant as Presumptive Decision Maker*

The preference for the defendant as the presumptive decision maker has won a number of adherents. The North Carolina Supreme Court, for example, drawing upon the notion that a lawyer is merely the client's agent, has adopted a very strong version of the defendant preference. It held that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to tactical decisions, the client's wishes must control.[76] Some commentators have voiced support for the allocation of all decisions, ultimately, to defendants.[77] Those commentators often rely on the logic of *Faretta* to justify that result.[78] If a defendant may proceed *pro se*, forsaking the assistance of a lawyer altogether and taking authority over all decisions, the defendant also possesses, as part of his Sixth Amendment rights, the power to accept legal assistance with respect to some decisions, but to reject it as to others.[79]

Justice Brennan's dissent in *Jones v. Barnes*[80] advanced a slightly more modest version of the defendant preference. There, Justice Brennan acknowledged that "[f]rom the standpoint of effective administration of justice, the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must be made quickly in the course of a trial."[81]

However, where compelling reasons of efficient trial management do not apply, Justice Brennan endorsed the assignment of decisions to

---

[76] State v. Ali, 407 S.E.2d 183, 189 (N.C. 1991); *see also* State v. Brown, 451 S.E.2d 181, 187 (N.C. 1994) (quoting *Ali*, 407 S.E.2d at 189).

[77] *See* Chused, *supra* note 50, at 651, 653 (idea that if a defendant can represent himself, that right includes within it the right to command the lawyer on any matter in which the defendant is interested); Singer, *supra* note 58, at 657 (finding that the Sixth Amendment gives a defendant the right to command his lawyer as to the insanity defense); Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Client With Mental Disability*, 68 FORDHAM L. REV. 1581, 1601 (2000) ("[A]s long as the client is able to give plausible, non–delusional reasons for his or her decision after demonstrating an understanding and consideration of the relevant information, that decision should be honored even when opposed to the attorney's."); Uphoff, *supra* note 8, at 819.

[78] *See* Chused, *supra* note 50, at 651–55.

[79] *Id.* at 651–53, 655.

[80] Jones v. Barnes, 463 U.S. 745 (1983) (Brennan, J., dissenting).

[81] *Id.* at 760 (Brennan, J., dissenting).

defendants.[82] Similarly, a few other jurisdictions seem to give presumptive control over decisions to defendants.[83]

Those who would make the defendant the presumptive decision maker tend to explain that allocation by invoking the defendant's interest in dignity and autonomy. For example, Justice Brennan wrote that "[t]he role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process."[84] Stating the position more colorfully, he added, "I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime."[85]

Advocates of the defendant preference theory have eloquently expressed their motivating principles. "Society values autonomy because we assume people are ordinarily the best judges of their own interests and because, even if they are not, taking away their opportunity to decide would show insufficient respect for the person."[86] In addition, "[b]eing charged with a crime and requesting the aid of a lawyer ought not deprive competent adults of their right to control the decisions which ultimately affect their lives and their liberty."[87] Moreover:

> [W]e the citizens of a liberal democracy should be concerned with the autonomy of all competent adults, even accused criminals. And insofar as feasible, we should accord to them the dignity of control over their own destiny. Certain choices, predicated on matters uniquely within their knowledge and understanding, deeply affecting their own futures, and fundamental to the process in which they find themselves immersed should adhere to their primordial autonomy despite a surrender of a package of discretionary options to their professional guardian.[88]

Using the infamous Unabomber case as an example, Professor Joel Newman stated the position most bluntly: "(1) It was Kaczynski's crime. (2)

---

[82] *See id.* at 759 (Brennan, J., dissenting).

[83] *E.g.*, Blanco v. State, 452 So. 2d 520, 524 (Fla. 1984); State v. Ali, 407 S.E.2d 183, 189 (N.C. 1991).

[84] *Jones*, 463 U.S. at 763 (Brennan, J., dissenting).

[85] *Id.* at 764 (Brennan, J., dissenting).

[86] Slobogin & Mashburn, *supra* note 77, at 1586.

[87] Uphoff, *supra* note 8, at 821–22.

[88] Uviller, *supra* note 21, at 741.

It was Kaczynski's trial. (3) It was Kaczynski's life."[89]

In commentators' statements, one finds at least three distinct intuitions favoring the defendant's control of decisions. In Part III, this article examines each of these three intuitions. For now, a brief description will suffice.

The first, the "autonomy intuition," addresses the matter from the point of view of trial consequences. This intuition expresses the idea that control properly lies in the hands of the person most at risk. Therefore, the defendant, who alone bears the risk of punishment, should control trial decisions. The second, the "dignity intuition," speaks in defense of human liberty. It looks not at the consequences of the criminal trial, but at the trial itself as an important arena of human activity. It proposes that the trial's conduct matters for its own sake. Fundamentally political in its meaning, this intuition expresses the idea that, insofar as the defense speaks on behalf of the defendant, a free society should not tolerate the imposition of an unwelcome defense on the person defended. The third, the "reliability intuition," declines to regard the matter from the defendant's point of view. Instead, this intuition cedes decision–making power to the defendant as a means of advancing the truth–seeking function of trial.

There is another intuition, the "legal formalism intuition," which is addressed only in this paragraph. One formalistic argument draws upon the text of the Sixth Amendment, which establishes a right to the *assistance* of counsel.[90] The italicized word is supposed to indicate the Founders' view that disputes between defendant and counsel must be resolved in favor of the defendant.[91] Without further explanation, this plain meaning argument blends into a second formalistic argument, which holds that future decisions belong to defendants because they belonged to defendants in the past. When presented to a judge bound by precedent, the formalistic arguments carry weight. Part II demonstrates that the prevailing legal regime, in application as well as in principle, lacks sufficient coherence to justify extending past tradition to present cases through the doctrine of *stare decisis*. Legal history alone, therefore, cannot answer this article's quest for justifications. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply

---

[89] Newman, *supra* note 71, at 100. Theodore Kaczynski was charged with mailing a number of bombs to persons he never met, killing three and maiming many more, during the years preceding his arrest. U.S. v. Kaczynski, 239 F.3d 1108, 1111 (9th Cir. 2001).

[90] U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

[91] Faretta v. California, 422 U.S. 806, 820 (1975); Uviller, *supra* note 21, at 765–66.

persists from blind imitation of the past."[92]

2. *The Lawyer as Presumptive Decision Maker*

The notion favoring the lawyer as the presumptive decision maker has also won adherents.[93] The Alabama Court of Criminal Appeals, for example, has expressed a version of the lawyer preference theory under which virtually all decisions belong to lawyers. That court wrote:

> The defendant cannot simultaneously assert his right to court appointed counsel and conduct his own defense. This Court will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses. If such decisions are to be made by the defendant, he is likely to do himself more harm than good, and . . . a contrary rule would seriously impair the constitutional guaranty of the right to counsel . . . . One of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial. We think that few competent counsel would accept retainers, or appointment . . . to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right.[94]

---

[92] Oliver Wendell Holmes, *The Path of the Law After One Hundred Years*, 110 HARV. L. REV. 991, 1001 (1997).

[93] *E.g.*, United States v. Calabro, 467 F.2d 973, 985–86 (2d Cir. 1972) (stating that a defendant is only entitled to decide whether to plead guilty, whether to testify, and whether to waive a jury); State v. Pratts, 366 A.2d 1327, 1333–34 (N.J. Super. Ct. App. Div. 1975), *aff'd*, 365 A.2d 928 (N.J. 1976) (finding that court did not err in refusing to direct defense counsel to call a witness at the defendant's request).

[94] Falkner v. State, 462 So. 2d 1040, 1042 (Ala. Crim. App. 1984) (citations and quotation marks omitted) (quoting United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982)); *see* Nelson v. State, 346 F.2d 73, 81 (9th Cir. 1965) (finding that counsel is the manager of the lawsuit and if the defendant were to control that position he would likely do himself more harm than good); State v. Lee, 689 P.2d 153, 159–60 (Ariz. 1984) (reading *Faretta* narrowly, in the context of a represented defendant); People v. Hamilton, 774 P.2d 730, 741 (Cal. 1989), *modified by* 49 Cal. 3d 501 (1989) ("When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics."); People v. Pondexter, 573 N.E.2d 339, 345 (Ill. App. Ct. 1991) ("An accused has either the right to have counsel represent him or the right to represent himself; however, a defendant has no right to both self representation and the assistance of counsel."); *see also Pratts*, 366 A.2d at 1333 (finding that when defendant accepts

This theory responds to the *Faretta* argument advanced by advocates of the defendant preference theory. Defendants who elect self representation have, by that choice, altered the fundamental purpose of the trial. The trials of represented defendants, conducted by professional advocates on both sides, aim, through the special genius of the adversary process, to discover the truth and render an accurate judgment under the law. The trials of self–representing defendants, on the other hand, undermine the sound functioning of the adversary process by pitting a professional prosecutor against a lay defendant, "likely to do himself more harm than good."[95] Their trials serve another purpose: they yield virtually certain convictions to the prosecution, while providing defendants a forum for self–expression.

On one occasion, the Eleventh Circuit endorsed a similarly broad view of the lawyer's decision–making role. In *Watts v. Singletary*,[96] the court confronted a claim made by a defendant who slept through approximately 70% of his murder trial.[97] For long stretches during the trial, Watts sat with his head bowed on his chest.[98] He did not rise when the jury entered and left the courtroom, and his lawyer was occasionally seen, often unsuccessfully, trying to shake him awake.[99] Observing Watts, some prospective jurors doubted their ability to impartially judge a defendant who would sleep during his own murder trial.[100] When asked to explain himself, Watts claimed that he was praying.[101] Defense counsel and the court, however, believed he was sleeping off the effects of out–of–court drug abuse.[102]

On appeal, Watts argued that the trial court erred in failing, *sua sponte*, to inquire into his competence to stand trial.[103] On habeas review, the Eleventh Circuit reversed the district court's grant of the writ.[104] In so ruling, the court concluded that, because very few decisions lie within the province of the defendant, a sleeping defendant is not, for that reason, an incompetent defendant.[105] Considering the defendant's role in light of that

---

representation by counsel, he consents to counsel's management of the case).

[95] *Falkner*, 462 So. 2d at 1042.

[96] Watts v. Singletary, 87 F.3d 1282 (11th Cir. 1996).

[97] *Id.*

[98] *Id.* at 1284.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 1286.

[104] *Id.* at 1289.

[105] *Id.* at 1288–89; *cf.* United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982) (reconfirming that decisions about calling witnesses belong to counsel).

holding, one is reminded of the maxim, prevalent in prior generations, describing the behavior of good children in polite company: they are to be seen but not heard. That view of the defendant's role is not new. A French observer of early nineteenth–century English courts, after seeing so little participation by the accused, commented that, "his hat stuck on a pole might without inconvenience be his substitute at trial."[106]

Supporters of the lawyer preference theory focus on the distortion of the adversarial process resulting from the empowerment of a deeply invested lay decision maker. Even advocates for the defendant as decision maker tend to recognize that, as compared to lawyers, defendants generally make poorer decisions.[107] To see the force of the point, one need only reflect on the Rivers case with which this article began.

Rivers could have presented a defense with some chance of winning outright acquittal, and a still better chance of producing a term–of–years sentence, or at least a life sentence with the possibility of parole. But because Rivers rejected those defenses in favor of a hopeless alternative, the jury may well have returned a verdict that did not reflect the truth of the case. Certainly, Rivers's decision denied the jury the opportunity to consider some of the most likely accounts of how the victim died. Giving this decision to the lawyer reduces the chances of such injustices because lawyers more likely know the best course of defense. Also, the lawyer's decisions, if incompetent, are subject to review for ineffective assistance of counsel.

One final point distinguishing the lawyer preference theory from the defendant preference theory deserves notice. The defendant preference gives to the defendant more freedom to act than the lawyer preference gives to lawyers. Those who advocate a defendant preference, for example, often identify a defendant's political values as a legitimate, or at least allowable, basis of trial decisions.[108] The advocates of the lawyer preference, on the other hand, need not accept the lawyer's political values as a valid influence on defense decisions. The difference lies in the fact that lawyers, even when empowered to make decisions for the defense, remain subject to the canons of professional responsibility and to judicial enforcement of their duty to zealously represent defendants. In a few cases, defendants have claimed that

---

[106] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 6 (2003) (citing CHARLES COTTU, ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND 88 (London 1822)).

[107] *See, e.g.*, Decker, *supra* note 12; Martinez v. Court of Appeal, 528 U.S. 152, 161 (2000) ("No one . . . attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient.").

[108] *E.g.*, Sabelli & Leyton, *supra* note 6, at 195–96.

their lawyers acted on personal political preferences to the detriment of the defense.[109]

The capital prosecution of Robert Lee Goldsby in Mississippi in 1954 illustrates the distorting dangers of politically motivated decision making by lawyers.[110] Goldsby, an African American World War II veteran, was traveling near the small town of Vaiden, Mississippi, with his family and two others when, after being refused service by the white proprietors of a filling station and dairy bar, he retrieved a pistol from his car. Goldsby opened fire, killing Mrs. Moselle Nelms, one of the proprietors.[111]

Soon after Goldsby's arrest, members of his family retained George Leighton, an African American lawyer from Chicago who, many years later, would become a United States District Judge in Illinois.[112] Leighton promptly prepared a motion challenging the indictment and trial venue on the ground that officials in Carroll County, Mississippi, discriminated on the basis of race in selecting persons to serve as grand and petit jurors.[113] Before Leighton could file those motions, other members of Goldsby's family retained a white lawyer from Vicksburg named John Prewitt, who "told [Goldsby's] relatives . . . that he could not work with the Negro attorney . . . ."[114] Leighton accordingly withdrew, and Prewitt did not file Leighton's motions. Represented by Prewitt, Goldsby was convicted of murder and sentenced to death.[115]

The challenge to the grand and petit jury lists had merit. Although fifty–seven percent of the adult population of Carroll County was, at that

---

[109] *See, e.g.*, United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993) (noting that defendant alleged ineffective assistance because of his lawyer's principled opposition to representing defendants who wish to enter a plea bargain, which requires cooperation with the government); Brown v. Doe, 2 F.3d 1236, 1240 (2d Cir. 1993) (noting that a defendant who belonged to the Weather Underground alleged ineffective assistance against the "revolutionary lawyers" who represented him at trial and whose political views allegedly induced them to adopt a "confrontational" posture vis–à–vis the prosecution); United States v. Lonetree, 35 M.J. 396, 412 (C.M.A. 1992) (raising a similar claim); *see also* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 73–75 (1995); Freedman, *supra* note 50, at 193.

[110] Goldsby v. State, 78 So. 2d 762 (Miss. 1955). The extraordinary case of Robert Lee Goldsby is retold with citations to court records, newspaper articles, and photographs on an internet web site. *Vaiden Mississippi: The Case of Robert Lee Goldsby*, (Feb. 15, 2005) *at* http://www.vaiden.net/goldsby.html.

[111] *Goldsby*, 78 So. 2d at 765.

[112] *Vaiden Mississippi* (Feb. 21, 2005), *at* http://www.vaiden.net/leighton.html.

[113] Goldsby v. Harpole, 263 F.2d 71, 73 (5th Cir. 1959).

[114] *Id.* at 73–74.

[115] *Id.* at 74.

time, non–white, neither "the Circuit Clerk, the Chancery Clerk, the Sheriff, the ex–Sheriff who had served for twenty years, the District Attorney, or the Circuit Judge—could remember any instance of a Negro having been on a jury list of any kind in Carroll County."[116] Therefore, Goldsby claimed in habeas corpus that Prewitt's unwillingness to challenge the institutional racism of Mississippi's 1950s judicial system deprived Goldsby of the relief to which he would have been entitled had the motions been filed.

Leighton resumed his representation of Goldsby after the trial and finally prevailed on a federal habeas petition before the Fifth Circuit where opposing counsel included Ross Barnett, the future segregationist governor of Mississippi.[117] That court observed that:

> Such courageous and unselfish lawyers as find it essential for their clients' protection to fight against the systematic exclusion of Negroes from juries sometimes do so at the risk of personal sacrifice which may extend to loss of practice and social ostracism. As Judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries.[118]

Criminal defense lawyers who are tempted to allow their own political preferences to influence their defense decisions should remember John Prewitt who, in acting on his political preference, very nearly cost his client his life. If it were acceptable for lawyers to consider their own political views in calculating how best to defend clients, I would abandon the proposal to allocate decisions primarily to lawyers. Because lawyers cannot do so, I proceed with the argument.

II. CURRENT ALLOCATION OF DECISION–MAKING AUTHORITY

More than thirty years ago, Welsh White noted that no court had satisfactorily justified the allocation of decision–making authority between

---

[116] *Id.* at 78.

[117] *Id.* at 74.

[118] *Id.* at 82. Goldsby was reconvicted and resentenced to death after a second trial, in which Leighton and then governor–elect Barnett appeared for the defense and prosecution, respectively. In 1961, Goldsby was put to death in Mississippi's gas chamber. *Vaiden Mississippi: The Case of Robert Lee Goldsby*, (Feb. 15, 2005) *at* http://www.vaiden.net/goldsby.html (quoting the Winona Times, June 1, 1986, at 1).

defense counsel and criminal defendant.[119] Courts and commentators have, in the succeeding years, continued to express discontent with the current state of the law.[120] Many have particularly mourned the inconsistency in allocation rulings.[121] LaFave and Israel claim that the laws theoretical incoherence causes this pattern of inconsistent allocations. They write: "The problems of uncertainty are exacerbated . . . by the absence of any well reasoned guidelines for distinguishing between those decisions requiring defendant's personal choice and those subject to counsel's control over strategy."[122] Part I noted significant problems affecting the coherence of most of the theories courts use to justify their allocation decisions. Part II describes the judicial rulings that have, with or without the benefit of a guiding principle, established the governing law.

This article's description of the law is organized by placing each defense decision in one of five categories. The first category contains two decisions: how to plead and whether to appeal. These deserve separate treatment because they are threshold decision involving the invocation or waiver of the adversary process. The second category contains evidentiary decisions, including which witnesses to call, what questions to ask those witnesses, and whether to seek exclusion of some of the prosecution's evidence. The third category includes decisions about the defendant's active, personal participation in the trial.[123] It addresses such issues as whether the defendant should testify, or whether the defendant should attend the trial and its associated proceedings. The fourth category contains decisions about the structuring of deliberations. For example, questions regarding whether the defense should assert insanity, an alibi, or admit culpability to a lesser included offense are included in this category. The

---

[119] *See* White, *supra* note 34, at 70–71.

[120] *E.g.*, Trimble v. State, 693 S.W.2d 267, 279 (Mo. Ct. App. 1985) (noting the "continuing difficulty in determining defense counsel's role in the criminal trial").

[121] Uphoff, *supra* note 8, at 765 & n.7, 777–79 (noting that the rules of ethics give uncertain guidance and the Constitution dictates very little about allocation).

[122] Uphoff, *supra* note 8, at 765 (quoting WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 559 (2d ed. 1992)).

[123] This third category excludes actions that a lawyer could perform, even if the law ultimately allows the represented defendant to control those actions. For example, the law could allow a represented defendant to call witnesses, decide what defenses to advance, and so forth. Those activities are discussed elsewhere because the law could also assign those decisions to the lawyer. But the lawyer cannot stand in for the defendant in the act of testifying, nor in the act of attending the trial; the defendent must do these things himself. Thus, this category includes those activities that must be the defendant's to perform, although the law could conceivably assign to the lawyer the decision of whether the defendant will perform them in a given case.

fifth category contains a miscellany of decisions, all relating to the structure of the trial. This category includes such questions as whether to seek a change of venue, whether to choose a bench or a jury trial, which prospective jurors to strike, whether to seek a continuance of trial, and myriad other decisions that do not belong in any other category.

A. Decisions About Whether to Invoke the Adversary Process

The first category includes decisions that invoke or waive the adversary process of adjudication. Such decisions include whether to plead guilty or not guilty, and whether to appeal after trial. The law governing this category of decision displays a good measure of consensus and consistency in assigning those decisions to defendants. Even here, though, courts have sometimes forsaken the general rule.[124] Before detailing the consensus and its exceptions, two points require clarification.

First, in many jurisdictions, one decision discussed here as a deliberation–structuring choice—whether to raise a defense of insanity—is, as a formal matter, exercised as a decision about how to plead. In those jurisdictions, a defendant raises the insanity defense by *pleading* not guilty by reason of insanity.[125] This article discusses the insanity defense decision as a deliberation–structuring choice because the insanity plea is a mode of defense. It is like other modes of defense in the most basic sense: it contests responsibility for the charged crime. For that reason, although it has unique characteristics that might justify allocating it to the defendant, it will be considered with the other modes of defense. To put the matter plainly, if the insanity defense decision properly belongs to defendants, it should belong to defendants regardless of whether a particular jurisdiction requires the defense to be raised by a plea.[126] In this first category, only the decision of whether to insist on adversary adjudication is discussed.

Second, some jurisdictions mandate an appeal from a criminal conviction in narrowly defined cases. In New Jersey, for example, defendants sentenced to death *must* appeal, even if they would prefer not to do so.[127] By making such a provision, those jurisdictions effectively remove

---

[124] *E.g.*, Massie v. Sumner, 624 F.2d 72 (9th Cir. 1980) (upholding California statute barring waiver of appeal by condemned prisoner); Cisconti v. United States, 454 F. Supp. 417 (D. Mass. 1978) (holding that defendant has no constitutional right to plead guilty in absence of statute providing such right).

[125] *E.g.*, N.H. REV. STAT. ANN. § 651:8-a (2004).

[126] *See* Singer, *supra* note 58, at 651.

[127] N.J. STAT. ANN. § 2C:11-3(e) (West 1995); *see also Massie*, 624 F.2d at 73–74; Nelson v. State, 681 So. 2d 252, 256 (Ala. Crim. App. 1995); State v. Dodd, 838 P.2d 86,

the decision of whether to appeal from the defense altogether. Accordingly, so long as lawmakers seek to protect the reliability of judgments in such cases by requiring an appeal, no issue of allocation of that decision between defendant and counsel can arise. Although this article proposes that decisions regarding pleas and appeals should belong to the defendant, it does not reach the question of what decisions should be left to, or removed from, the defense altogether. Thus, by arguing that the defendant should retain final control over the decision of whether to appeal when the law commits that decision to the defense, this article does not criticize any legislative judgment that removes this decision from the defense.[128]

1. *The Decision of How to Plead*

In *Jones v. Barnes*, the Supreme Court recognized that defendants must retain "ultimate authority to make certain fundamental decisions regarding the case," including the decisions of whether to plead guilty and whether to appeal.[129] The Court cited the *ABA Standards for Criminal Justice*, which also assigns those decisions to the defendant.[130] The *Model Rules of Professional Conduct* and the *Model Code of Professional Responsibility* concur that the decision of how to plead belongs to the defendant.[131] Lower

---

95 (Wash. 1992) (discussing state laws about waivability of capital appeals).

[128] *Cisconti*, 454 F. Supp. at 418. *See also* Singer, *supra* note 58, at 662 (arguing that a court's only real ground to refuse to allow a guilty plea is where there is doubt about the voluntariness or intelligence of the plea). There also exists authority suggesting that the State may similarly remove from the defense the decision of how to plead. For example, in *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970), the Court wrote: "Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . ." *Compare* Santobello v. New York, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted.") *with* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 276 (1942) ("The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes.").

[129] Jones v. Barnes, 463 U.S. 745, 751 (1983).

[130] ABA STANDARDS FOR CRIMINAL JUSTICE 4–5.2, 21–2.2 (2d ed. 1980); *see also* Brookhart v. Janis, 384 U.S. 1, 7–8 (1966) (holding that the Constitution does not permit counsel to enter a guilty plea over a defendant's objection).

[131] MODEL RULES OF PROF'L CONDUCT R. 1.2 (a) (2003); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7–7 (1981).

courts generally agree.[132]

However, dissenting voices have spoken. In *People v. Massie*,[133] the California Supreme Court, applying a California statute,[134] held that a capital defendant may not plead guilty to a capital charge against the advice of counsel.[135] The California rule did not go so far as to reassign to lawyers the decision of how to plead; in fact, nothing in the rule suggests that a lawyer could enter a plea of guilty over the defendant's objection. Rather, the California rule merely withdraws the decision to plead guilty from the sole province of the defendant by requiring the lawyer's agreement.[136]

Perhaps a looming death penalty tends to warp the law. However, even outside the possibly anomalous context of capital punishment, authorities sometimes suggest that the pleading decision does not belong exclusively to defendants. Consider, for example, the non–capital murder prosecution of Thomas Johnson.[137]

Johnson, age seventeen, "shot his brother after the two had been involved in a heated argument."[138] Before trial, the prosecution offered to allow Johnson to plead guilty to manslaughter. Although the lawyer discussed the offered bargain with Johnson, the decision to reject it and proceed to trial was ultimately made by the lawyer and Johnson's father. At the time that decision was made, Johnson was, by his own admission, "very confused."[139] However, he was found competent to stand trial.[140] In affirming Johnson's murder conviction, the federal appellate court acknowledged that "the decision to plead guilty is one that must be made by the defendant, and is not one in which an attorney may speak for his

---

[132] *E.g.*, People v. Rogers, 363 P.2d 892, 894–95 (Cal. 1961) (noting that the decision of whether to plead guilty to a lesser offense also frequently reflects strategic concerns, but that a defendant nonetheless retains personal control over such a plea); Miles v. Sheriff, 581 S.E.2d 191, 192 (Va. 2003) (stating that the decision of whether to appeal belongs to the defendant).

[133] People v. Massie, 967 P.2d 29 (Cal. 1998).

[134] CAL. PENAL CODE § 1239(b) (West 2003).

[135] *Massie*, 967 P.2d at 37, 59 (confirming holding of earlier appeal in Massie's case); *see also* North Carolina v. Alford, 400 U.S. 25, 39 n.12 (1970) (North Carolina law, for a time, barred defendants from pleading guilty to capital offenses). The North Carolina rule contemplated in *Alford* differs from the California rule in that the North Carolina rule removed the decision of how to plead from the defense altogether, while the California rule allowed a defendant to plead guilty only with the concurrence of counsel.

[136] § 1239(b).

[137] Johnson v. Duckworth, 793 F.2d 898 (7th Cir. 1986).

[138] *Id.* at 899.

[139] *Id.*

[140] *Id.* at 902.

client without consultation."[141] However, the court found "a significant difference between the consequences emanating from a decision to reject a plea agreement and not plead guilty and the decision to enter a guilty plea."[142] Relying on Johnson's atypical qualities—a seventeen–year–old defendant charged with the murder of his brother who admitted in post–conviction proceedings that he was "very confused" at the time the prosecution offered the plea bargain—the court concluded that his lawyer could control the decision to reject a plea bargain.[143]

The case raises a question of whether the allocation of the power to decide depends on whether the choice made asserts constitutional rights or waives them. The law could allow lawyers to enter a "not guilty" plea over a client's objection because that choice asserts the constitutional right to a trial, but not allow a lawyer to enter a "guilty plea" over a client's objection, because that choice waives the right to a trial. That is, should the law let the lawyer decide how to plead only if the lawyer decides to plead "not guilty?"

The California statute described above gives one answer to the question by requiring capital defendants and their lawyers to agree before entering a guilty plea, while allowing the defendant alone to insist on a plea of not guilty.[144] The New Hampshire trial court presiding over the 2001 murder trial of Robert Tulloch answered the question differently when the court allowed Tulloch, against the advice of his lawyer, to plead guilty to first–degree murder, thereby guaranteeing a sentence of life imprisonment without parole.[145] Should defendants who have what their lawyer believes to be a plausible defense be permitted to plead guilty?

From the point of view of the reliability of trial results, there seems to be no problem with the New Hampshire resolution, which commits the decision of how to plead to the defendant alone, regardless of which plea the defendant chooses to enter. When the defense, by pleading guilty, fails to play its assigned adversarial role of contesting the charges, that plea significantly corroborates the truth of the charges. However, courts do not enter a judgment of conviction without any further inquiry; they will accept a guilty plea only if satisfied that the defendant acted voluntarily and intelligently in so pleading, and only if the record establishes a factual basis to believe the defendant actually is guilty.[146]

---

[141] *Id.* at 900.

[142] *Id.* at 901.

[143] *Id.* at 902.

[144] CAL. PENAL CODE § 1239(b) (West 2003).

[145] J.M. Hirsch, *Tulloch Admits to Slayings*, CONCORD MONITOR, April 5, 2002, at 1, *available at* http://199.125.13/stories/news/recent2002/zantop%5mina.

[146] Boykin v. Alabama, 395 U.S. 238, 242 (1969).

2. *The Decision of Whether to Appeal*

A substantial consensus exists for assigning the decision of whether to appeal to the convicted defendant.[147] The *Jones v. Barnes* Court listed the decision among those constitutionally committed to the defendant,[148] and authorities on legal ethics concur.[149] Indeed, the decision of whether to appeal, as a federal constitutional matter, has even resisted the creation of a special rule for capital punishment. In *Gilmore v. Utah*, the Supreme Court lifted Gary Gilmore's stay of execution upon receipt of documents establishing Gilmore's intention that his death sentence not be appealed.[150] Justices White, Brennan, and Marshall, in dissent, noted the presence of substantial appellate claims and argued that "the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.[151]

Some ambiguity about the prerogatives of client and of counsel has clouded the clarity of the consensus. In *Anders v. California*, the lawyer appointed on direct appeal decided that Anders's claims had no merit, and by letter so informed the California appellate court.[152] The Supreme Court disapproved of the California procedure that allowed submission of such a letter, but still concluded that:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.[153]

---

[147] Again, the exception is that some jurisdictions in capital cases withdraw from the defense the decision whether to appeal; for example, see N.J. STAT. ANN. § 2C:11-3(e) (West 1995). New Jersey even refuses to allow a defendant under sentence of death to abandon state post-conviction remedies. State v. Martini, 677 A.2d 1106, 1109 (N.J. 1996).

[148] Jones v. Barnes, 463 U.S. 745, 751 (1983).

[149] *E.g.*, MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1981).

[150] Gilmore v. Utah, 429 U.S. 1012, 1012 (1976).

[151] *Id.* at 1018 (White, J., dissenting); *see also* Whitmore v. Arkansas, 495 U.S. 149, 172 (1990) (Marshall, J., dissenting).

[152] Anders v. California, 386 U.S. 738, 740 (1967); *see also* Smith v. Robbins, 528 U.S. 259, 265–66 (2000); McCoy v. Court of Appeals, 486 U.S. 429, 448–49 (1988) (elaborating on *Anders* procedure); Penson v. Ohio, 488 U.S. 75, 80–82 (1988).

[153] *Anders*, 386 U.S. at 744.

Thus, although the defendant has the power to decide whether to appeal, counsel has the power, by filing an *Anders* brief, to scuttle the appeal for all practical purposes by telling the court that the issues are "wholly frivolous." Some jurisdictions, however, reject the *Anders* procedure and require an appellate counsel confronted with a frivolous claim to "argue[] the defendant's case as well as possible."[154] In rejecting the *Anders* rule and requiring appellate counsel to argue even meritless appeals without signaling their weaknesses, the New Hampshire Supreme Court noted that its procedure preserved "the adversarial nature of criminal appeals."[155]

The *Anders* procedure raises an important question. Defense counsel's declaration that an appeal is wholly frivolous amounts to the abandonment of an appeal desired by the convicted defendant. A different question is raised when appellate counsel and the convicted defendant agree to pursue an adversarial appeal, but disagree about what issues should be presented. That decision is properly categorized with trial deliberation–structuring decisions, such as whether to present an insanity defense or some other defense. Consideration of that decision is deferred, therefore, to Part II(D)(3) below.

B. Evidentiary Decisions

The second category includes decisions about the admission of evidence. This article describes the law relating to three evidentiary decisions: which witnesses to call, what questions to ask testifying witnesses, and what items of prosecution evidence to oppose with a motion to suppress or exclude. Mindful of the influence of the death penalty on rules of criminal law and procedure, I discuss also a specific decision that arises with some frequency in capital cases: whether to call witnesses in mitigation of sentence.

In this category, one finds many inconsistencies within and between jurisdictions.[156] Possibly, the inconsistencies prove only the fallibility of judges or the diversity of approaches to the problem taken by different

---

[154] State v. Cigic, 639 A.2d 251, 254 (N.H. 1994) (citing cases, including Commonwealth v. Moffett 418 N.E.2d 585, 591 (Mass. 1981)); *see also In re* Attorney's Fees of Mohr, 32 P.3d 647, 653 (Haw. 2001).

[155] *Cigic,* 639 A.2d at 253.

[156] Treece v. State, 547 A.2d 1054, 1058 (Md. 1988) ("[T]here is agreement that as to some matters connected with a criminal trial, counsel has the final say; there is not agreement, however, as to precisely what those matters are."); Sabelli & Leyton, *supra* note 6, at 166 (noting "the lack of clarity, under case law and ethical canons, regarding the allocation of authority within the attorney–client relationship").

jurisdictions. More likely, however, they demonstrate the difficulty of the problem. Our justice system deals more comfortably with disputes between adversaries, and even between adversaries and nonparties such as witnesses, jurors, co–defendants, and former counsel. When, however, one side of the adversary equation displays an inability to speak with one voice, the system strains to form responsive rules.

1. *Deciding Which Witnesses to Call*

The profession, in its several formulations of ethical rules, has expressed inconsistent views about who ultimately controls decisions about which witnesses to call.[157] *The American Bar Association's Standards for Criminal Justice* provide that the "decisions on what witnesses to call, whether and how to conduct cross–examination . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client."[158] Another provision in the *Standards*, however, hints at a different allocation in some circumstances. Standard 4–3.1 provides that "the technical and professional decisions must rest with the lawyer without impinging on the rights of the accused to make the ultimate decisions on certain specified matters . . . ."[159] The commentary to that standard explains that "[i]n questions of means, the lawyer should assume the responsibility for technical and legal, strategic and tactical issues, such as what witnesses to call . . . . But defense counsel should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."[160] Taken together, the *Standards* seem to commit the decision on which witnesses to call to the lawyer, except when the defendant's opposition relates to expense or to the interests of third persons.

The *Model Code of Professional Responsibility*, without speaking precisely on the point, appears to favor allocation of the decision to the client.[161] After discussing the problem of perjured testimony, the *Code* provides that "a lawyer should, however, present any admissible evidence his client desires to have presented" unless the lawyer knows or should

---

[157] Uphoff, *supra* note 8, at 778 ("[T]he vagueness of the objectives/means test and the inconsistencies in the Model Rules and their Comments neither mandate a particular structure to the attorney–client relationship nor dictate a particular resolution" to the problem of who decides which witnesses to call).

[158] ABA STANDARDS FOR CRIMINAL JUSTICE 4–5.2(b) (1980).

[159] *Id.* at 4–3.1(b).

[160] *Id.* at 4–3.1 cmt. at 148.

[161] MODEL CODE OF PROF'L RESPONSIBILITY EC 7–26 (1981).

know that the evidence is false.[162] The *Model Rules* provide that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[163] Further, the *Rules* expressly list certain client decisions by which the lawyer must abide.[164] The decision of whether to call witnesses is not listed among the decisions committed to the client; this omission seems to support the allocation of those decisions to lawyers. The comment, however, notes that "lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."[165] The *Rules* ultimately decline to resolve the matter. The comment continues by noting that, "[b]ecause of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved."[166]

The Supreme Court has never expressly decided if the Constitution answers the question of whether lawyer or client has the final authority to decide which witnesses to call. After comprehensively reviewing the Court's jurisprudence on the subject, Rodney Uphoff concluded that "neither the Constitution nor the Supreme Court offers a definitive answer . . . or significant guidance in resolving the troublesome allocation of decision–making questions that lawyers, clients, and courts regularly confront."[167]

Still, at times, justices have made relevant statements. Chief Justice Burger, concurring in *Wainwright v. Sykes*,[168] expressed in a footnote that "[o]nly such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make."[169] He thereby implied that choices about which witnesses to call belong to lawyers. Justice Marshall, dissenting in *Alvord v. Wainwright*, insinuated that the decision of which witnesses to call probably belongs to the

---

[162] *Id.*; Uphoff, *supra* note 8, at 774 (discussing aforementioned canon).

[163] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002).

[164] *Id.*

[165] *Id.* at 1.2(a) cmt. 2.

[166] *Id.*

[167] Uphoff, *supra* note 8, at 789.

[168] Wainwright v. Sykes, 433 U.S. 72 (1977).

[169] *Id.* at 93 n.1 (Burger, C.J., concurring); *see also* Alvord v. Wainwright, 469 U.S. 956, 956, 959 (1984) (Marshall, J., dissenting) (allocating to the defendant decisions to plead, to testify, and to waive jury).

lawyer.[170] Also, in *Taylor v. Illinois*,[171] Justice Stevens stated a fairly strong version of the lawyer preference.[172] Even *Faretta*,[173] which otherwise states a strong preference for client control, acknowledged that "law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas."[174]

Many lower courts also allocate the decision to lawyers.[175] In making that allocation, courts often reject the argument that the defendant's right of self representation logically includes within it the power both to demand counsel and to direct counsel's actions.[176] Those courts hold that, by accepting counsel, the defendant surrenders the right to decide which witnesses to call.[177] On the other hand, some courts and commentators give the defendant the final decision about which witnesses to call.[178] In making that allocation, courts often reason that the greater right of self

---

[170] *See Alvord*, 469 U.S. at 961 ("As this Court has noted, '[w]ith the exception of [the three] specified fundamental decisions [involving waiver of constitutional rights], an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.' When counsel is obliged to make the decision himself, blind deference to a client's wishes, without any investigation, is unquestionably inappropriate and constitutionally ineffective." (quoting Jones v. Barnes, 463 U.S. 745, 753 n.6 (1983)) (citation omitted).

[171] Taylor v. Illinois, 484 U.S. 400 (1988).

[172] *Id.* at 417–18 ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.").

[173] Faretta v. California, 422 U.S. 806 (1975).

[174] *Id.* at 820.

[175] *E.g.*, United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982); United States v. Miller, 643 F.2d 713, 714 (10th Cir. 1981); Eaton v. United States, 437 F.2d 362, 363 (9th Cir. 1971); State v. Lee, 689 P.2d 153, 158 (Ariz. 1984); State v. Davis, 506 A.2d 86, 92 (Conn. 1986); Boyd v. United States, 586 A.2d 670, 673 (D.C. 1991); Ridley v. State, 510 S.E.2d 113, 119 (Ga. Ct. App. 1998); Cauley v. State, 416 S.E.2d 575, 577 (Ga. Ct. App. 1992); Levesque v. State, 664 A.2d 849, 852 (Me. 1995); State v. Rubinstein, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987) (declaring that decision regarding what witnesses to call and what questions to ask belongs to lawyer, but upholding performance of lawyer who, at client's direction, declined to cross-examine any of state's witnesses).

[176] State v. Pratts, 366 A.2d 1327, 1333–34 (N.J. Super. Ct. App. Div. 1975), *aff'd*, 365 A.2d 928 (N.J. 1976).

[177] *See id.*

[178] *E.g.*, Blanco v. State, 452 So. 2d 520, 524 (Fla. 1984) ("[T]he trial court did not err in allowing appellant to present witnesses. The ultimate decision is the defendant's."); *see also* State v. Thomas, 625 S.W.2d 115, 123–24 (Mo. 1981). *See generally* Uphoff, *supra* note 8, at 799–800 (proposing that, generally, allocation of the decision about which witnesses to call should be to the defendant, unless certain factors are satisfied).

representation necessarily implies that the defendant retains the lesser right to decide, even against the advice of counsel, which witnesses to call.[179]

In some jurisdictions, one finds contradictory authority on the question.[180] For example, in *People v. Abt*,[181] an Illinois court wrote that "certain matters involving trial strategy are left to the discretion of trial counsel, such as: whether to offer certain evidence, whether to call particular witnesses, which defense theory to present at trial, and whether and how to conduct cross–examination."[182] But *Abt* did not take into account the earlier case of *People v. Roofener*.[183] In that case, an Illinois trial court allowed defense cousel to withdraw because Roofener wanted to call witnesses that counsel refused to call.[184] If this decision belongs to lawyers, Roofener's lawyer should simply have refused to call the witnesses while continuing representation. The appellate court affirmed the trial court's resolution of the matter, implying that the decision about which witnesses to call belongs to the defendant.[185]

Such case law inconsistencies can be partially explained by the diversity of the procedural contexts in which allocation disputes arise. Sometimes a dispute remains hidden from the judge and does not appear in the record until a post–trial claim of ineffective assistance of counsel is filed. The defendant then asserts that the lawyer rendered ineffective assistance either in taking a decision belonging to the defendant[186] or in yielding to the defendant the power to make a decision on a matter properly within the lawyer's province.[187] In either event, what could have been a pristine trial dispute about the proper allocation of the decision in question becomes an analytically complex post–conviction dispute about ineffective

---

[179] *See Thomas*, 625 S.W.2d at 124.

[180] *Compare* Burton v. State, 651 So. 2d 641, 656 (Ala. Crim. App. 1993) (allocating decision to defendants), *aff'd*, 651 So. 2d 659 (Ala. 1994), *with* Falkner v. State, 462 So. 2d 1040, 1041–42 (Ala. Crim. App. 1984) (allocating decision to lawyer). *Compare* State v. Gary, 501 S.E.2d 57, 62 (N.C. 1998) (allocating decision to lawyer) *with* State v. Brown, 451 S.E.2d 181, 187 (N.C. 1994) (allocating decision to defendant) *and* State v. Ali, 407 S.E.2d 183, 189 (N.C. 1991) (allocating decision to defendant) *and* State v. McDowell, 407 S.E.2d 200, 211 (N.C. 1991) (allocating decision to lawyer).

[181] People v. Abt, 646 N.E.2d 1341 (Ill. App. Ct. 1995).

[182] *Id.* at 1348; *see also* People v. Pondexter, 573 N.E.2d 339, 345 (Ill. App. Ct. 1991).

[183] People v. Roofener, 420 N.E.2d 189 (Ill. App. Ct. 1981).

[184] *Id.* at 191–92.

[185] *See id.* at 194.

[186] *E.g.*, Johnson v. Duckworth, 793 F.2d 898, 899 (7th Cir. 1986).

[187] State v. White, 508 S.E.2d 253, 271 (N.C. 1998); Ryder v. State, 83 P.3d 856, 877 (Okla. Crim. App. 2004), *cert. denied*, 125 S. Ct. 215 (2004).

assistance of counsel.[188]

Even when the lawyer or client informs the trial court of the existence of an irreconcilable dispute about a decision in time for the trial court to investigate and allocate the decision, the disputants frequently complicate the issue by invoking unnecessary remedies. The lawyer or client, influenced by the extreme stress of a criminal trial, may view the dispute as a complete breakdown in the attorney–client relationship requiring a change of defense counsel. For example, instead of looking for guidance about who controls a disputed decision, lawyers sometimes seek to withdraw shortly before trial is to begin.[189] This action only complicates the allocation decision by presenting it as a problem to be addressed through the rules governing motions to withdraw. On other occasions, the defendant complicates the allocation problem by trying to fire the lawyer and proceed *pro se* or with new counsel.[190] Sometimes, even the trial courts themselves complicate disputes that the disputants appropriately present to the court as an allocation problem by limiting the defendant to the choice of proceeding *pro se* at trial or deferring to counsel's judgment.[191]

Trial courts that resolve allocation problems by requiring a structural reorganization of the defense face unsatisfactory options. Rarely will courts allow the substitution of new counsel mid–trial, because that remedy almost certainly necessitates a mistrial, and may not even resolve the dispute because new counsel and the defendant may well reach the same impasse.[192] Therefore, courts that simply treat decision allocations as organizational problems of the defense turn to *Faretta* and confront the defendant with the choice of yielding to counsel's views or proceeding *pro se*. Defendants who want only to control a particular decision can do so only if they can get

---

[188] *See, e.g.*, United States v. Mullins, 315 F.3d 449, 452, 453, 455–56 (5th Cir. 2002) (finding deficient performance where counsel precluded defendant from testifying, but affirming conviction upon finding no prejudice after applying the test for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688 (1984)), *cert. denied*, 124 S. Ct. 2096 (2004).

[189] *E.g.*, Lowenfield v. Phelps, 817 F.2d 285, 289 (5th Cir. 1987), *aff'd*, 484 U.S. 231 (1988); *Roofener*, 420 N.E.2d at 190 (noting that, instead of seeking confirmation of counsel's authority to refuse to call a witness, Roofener's lawyer moved to withdraw from the case).

[190] *E.g.*, People v. Bell, 363 N.E.2d 1202, 1205 (Ill. App. Ct. 1977).

[191] *E.g.*, State v. Carter, 14 P.3d 1138, 1141–42 (Kan. 2000).

[192] *See* United States v. Calabro, 467 F.2d 973, 986 (2d Cir. 1972) (stating that "[o]nce trial has begun, however, a defendant does not have the unbridled right to reject assigned counsel and demand another").

through a mid–trial *Faretta* self representation colloquy.[193] That control comes at a high price, however, because the defendant will lose the benefit of counsel for the rest of the trial. If the defendant cannot get through the *Faretta* colloquy, the defendant loses control over the decision even if it involves a matter that properly belongs to the defendant, such as whether the defendant should testify. In either scenario, the ability of the defendant to get through the *Faretta* colloquy becomes the test for allocation of the decision. I do not mean to suggest that complete breakdowns in the attorney–client relationship never happen, or that all such breakdowns are rooted in a dispute about a particular defense decision. But many defendant–lawyer disputes present simply decision allocation problems. Treating those disputes as implicating *Faretta* needlessly substitutes an inapt legal analysis, and often exacts from defendants a greater price (loss of representation) than they owe simply for the right to control one particular decision.

California cases illustrate this procedural context. In some cases, California courts have held that the decision of which witnesses to call belongs to the lawyer.[194] However, in other cases California courts have found no ineffective assistance of counsel when the lawyer simply defers to the defendant's preference and calls witnesses that the lawyer firmly believes should not be called.[195] Thus, these courts have upheld both the right of the lawyer to decide which witnesses to call and also the right of the lawyer to abdicate that decision to the defendant.

Courts in some other jurisdictions avoid that inconsistency.[196] The flaw in the California reasoning lies in its conception of the lawyer's power to decide which witnesses to call as a right personal to the lawyer, and which the lawyer can waive by deferring to the defendant. That description misconceives the issue; the lawyer has no personal right or interest in the defendant's case. The lawyer's power to decide which witnesses to call is better understood as an obligation that cannot be abandoned rather than as a right the lawyer may waive.

---

[193] Recall that in *Faretta*, the Supreme Court found those criminal defendants have a constitutional right to refuse legal representation and proceed *pro se*, but only if they can convince the trial court that they possess the requisite degree of competence, and that they have made the choice knowingly and intelligently.

[194] People v. Williams, 471 P.2d 1008, 1015 (Cal. 1970) (indicating that the lawyer decides which witnesses to call), *construed in* People v. Turner, 10 Cal. Rptr. 2d 358 (Cal. Ct. App. 1992).

[195] People v. Gadson, 24 Cal. Rptr. 2d 219, 225–26 (Cal. Ct. App. 1993); People v. Galan, 261 Cal. Rptr. 834, 835–37 (Cal. Ct. App. 1989).

[196] State v. Lee, 689 P.2d 153, 158–59 (Ariz. 1984); State v. Robinson, 224 S.E.2d 174, 179–80 (N.C. 1976).

In sum, significant disagreement exists about the proper allocation of the decision of which what witnesses to call. Support for both sides may be found in the American Bar Association's various ethical pronouncements.[197] Jurisdictions across the country have divided on whether to allocate the decision to the lawyer or to the defendant. In some jurisdictions favoring allocation to the defendant, there is unreconciled case law implying that the decision belongs to *lawyers*. Thus, on balance, the greater weight of authority seems to allocate this decision to the lawyer.[198]

2. *Deciding Which Witnesses to Call in the Capital Penalty Phase*

The support for assigning witness decisions to lawyers substantially diminishes when the question arises in the specific context of mitigation witnesses in capital sentencing trials. The reduction is rather startling, for one can scarcely imagine another situation in which society could have a greater interest in the accuracy of the results of trial and, therefore, greater reason to entrust the decisions to lawyers. Nevertheless, a substantial consensus assigns decisions about mitigating witnesses to capital defendants.

In *People v. Lang*,[199] the California Supreme Court argued for allocation of this decision to defendants, in the following terms:

> To require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client. Moreover, imposing such a duty could cause some defendants who otherwise would not have done so to exercise their Sixth Amendment right of self representation before commencement of the guilt phase in order to retain control over the presentation of evidence at the penalty phase, resulting in a significant loss of legal protection for these defendants during the guilt phase.[200]

---

[197] *See supra* notes 158–60 and accompanying text.

[198] Uphoff, *supra* note 8, at 792 ("On the specific issue of who ultimately controls the selection of witnesses, case law is split. The vast majority of state courts that have confronted the question have resolved the issue by declaring it a tactical matter to be decided by defense counsel.").

[199] People v. Lang, 782 P.2d 627 (Cal. 1989).

[200] *Id.* at 653 (citations omitted).

The court justified its allocation of the decision to the defendant in part out of concern for the reliability of outcomes. With that allocation, the court sought to protect the attorney–client relationship in order to prevent the greater harm of self representation.[201]

Other courts allocate the decision to defendants,[202] presumably recognizing that the allocation generally works against the defendant's best interest, but nonetheless doing so on the ground that the defendant's interest in dignity and autonomy command it.[203] Apparently, the Supreme Court also endorses that view, insofar as it has found no constitutional violation in cases in which a defendant has chosen to present no mitigating evidence.[204] Some commentators also endorse this allocation.[205]

The New Jersey Supreme Court, in *State v. Koedatich*, decided *not* to assign mitigation witness decisions to capital defendants,[206] instead assig–

---

[201] *Id.*; *see also* Kirksey v. State, 923 P.2d 1102, 1112 (Nev. 1996) (following the reasoning of the *Lang* Court and finding that defendants cannot claim ineffective assistance of counsel when counsel merely followed their instructions).

[202] *See, e.g.*, State v. Roscoe, 910 P.2d 635, 650 (Ariz. 1996); Koon v. Dugger, 619 So. 2d 246, 250, 251 (Fla. 1993); People v. Burton, 703 N.E.2d 49, 63 (Ill. 1998); Trimble v. State, 693 S.W.2d 267, 280 (Mo. Ct. App. 1985); People v. Lavalle, 697 N.Y.S.2d 241, 242–43 (N.Y. Sup. Ct. 1999); State v. Ashworth, 706 N.E.2d 1231, 1237 (Ohio 1999); Wallace v. State, 893 P.2d 504, 510 (Okla. Crim. App. 1995); Commonwealth v. Sam, 635 A.2d 603, 611–12 (Pa. 1993); Zagorski v. State, 983 S.W.2d 654, 660–61 (Tenn. 1998); State v. Woods, 23 P.3d 1046, 1083 (Wash. 2001).

[203] *E.g.*, *Roscoe*, 910 P.2d at 650 (noting a "strong privacy interest"); *Lavelle*, 697 N.Y.S.2d at 242–43 (describing the decision as "fundamental" and belonging to the client even if it is "best left to the attorney").

[204] *See, e.g.*, Godinez v. Moran, 509 U.S. 389, 392–93, 402 (1993); Blystone v. Pennsylvania, 494 U.S. 299, 306 & n.4 (1990) (affirming death sentence where "[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any proof of mitigating evidence . . . .").

[205] Bonnie, *supra* note 17, at 1387; Michael Mello, *Representing Death Row: An Argument for Attorney–Assisted Suicide*, 34 CRIM. L. BULL. 48, 60–64 (1998); Slobogin & Mashburn, *supra* note 77, at 1638–39; Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 868–69 (1987).

[206] State v. Koedatich, 548 A.2d 939, 993 (N.J. 1988); *see also* People v. Clark, 833 P.2d 561, 623 (Cal. 1992) (noting that defense was allowed to call mitigating witnesses over personal objection of defendant); People v. Deere, 710 P.2d 925, 931 (Cal. 1985) (holding that defense counsel's failure to present mitigating evidence during the penalty phase of a capital murder trial constituted ineffective assistance of counsel); Muhammad v. State, 782 So. 2d 343, 363–64 (Fla. 2001) (finding that where defendant refused to present mitigating evidence, trial court erred in failing to provide an alternative means of advising the jury of available mitigating evidence); Klokoc v. State, 589 So. 2d 219, 220 (Fla. 1991) (noting that the trial court allowed counsel to present mitigating evidence over the objection of the defendant); Morrison v. State, 373 S.E.2d 506, 509 (Ga. 1988) (finding that the decision of

ning them to defense counsel. In so ruling, the court relied on "the State's 'interest in a reliable penalty determination.'"[207] The court noted that the constitutionality of the state's death penalty statute depends upon the presence of procedures enabling the sentencer to distinguish the few offenders deserving of death from the greater number more appropriately punished by life imprisonment. The court accordingly assigned the witness decision to the lawyer because:

> A defendant who prevents the presentation of mitigating evidence "withholds from the trier of fact potentially crucial information bearing on the penalty decision . . . . It is self–evident that the state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty . . . . Without any evidence in the record of mitigating factors we are missing a significant portion of the evidence that enables us to determine if the imposition of the death penalty was appropriate. Hence, we would be unable to discharge our constitutional and statutory requirement to review a judgment, and, therefore, we would fail to safeguard the state's interest in insuring the reliability of death–penalty decisions.[208]

In *United States v. Davis*,[209] a federal court devised an ingenious solution to the problem, allowing Davis to represent himself at his capital sentencing trial, while appointing an "independent counsel . . . to represent the interest of the public."[210] That lawyer would present mitigating evidence while the defendant, representing himself, intended to present none.[211] The Fifth Circuit, however, rejected the trial court's effort to preserve both the defendant's autonomy and the quality of the information presented to the jury. The court relied in part on its conclusion that Davis's "right to self representation encompasses the right to direct trial strategy," and that appointment of an independent counsel to present a different theory of mitigation undermined that right.[212] In dissent, Judge Dennis rejected the notion that a capital defendant's right of self representation is:

> an insuperable right that is not diminished by the dramatic change in the defendant's autonomy interest resulting from his criminal conviction; an impregnable right that so outweighs the national interest in fairness,

---

whether to present mitigating witnesses ultimately belongs to the defendant, but noting that the trial court may have an independent duty to investigate mitigating evidence).

[207] *Koedatich*, 548 A.2d at 993 (quoting *Deere*, 710 P.2d at 931).

[208] *Id.* at 994–95 (citations omitted).

[209] United States v. Davis, 285 F.3d 378 (5th Cir. 2002).

[210] *Id.* at 380.

[211] *Id.* at 380–81.

[212] *Id.* at 385.

> accuracy, and equality in federal capital sentencing proceedings that it permits of no significant regulation or supplementation by the trial courts; and a right that is so perfect and untrammeled that the convicted capital offender may, within his complete discretion, use it either to make a defense or to condemn himself to death.[213]

Some commentators join New Jersey and Judge Dennis in preferring to allocate the mitigating witness decision away from defendants.[214]

Notwithstanding the substantial authority in most jurisdictions supporting assignment of mitigation witness decisions to defendants, there exists a sub–theme in the case law reflecting courts' reluctance to live with the consequences of that allocation. Many federal courts, reviewing habeas claims brought by condemned prisoners, adopt a kind of intermediate position. This position grants the defendant final authority to decide whether to present mitigating evidence, but insists that defense counsel must first investigate mitigating evidence and, in essence, try to persuade the defendant to allow its presentation.[215] Only upon a thorough showing of the voluntariness and "intelligence" of the defendant's decision not to present mitigating witnesses will the courts sustain a death sentence.[216]

The North Carolina Supreme Court's decision in *State v. Wilkinson*[217] exemplifies the reluctance of courts to allow defendants casually to commit

---

[213] *Id.* at 387 (Dennis, J., dissenting).

[214] *E.g.*, Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75 (2002) (finding that "[i]t is not at all necessary to allow a prevention of the presentation of mitigating evidence to justify the defendant's need to admit guilt."); Laura A. Rosenwald, Note, *Death Wish: What Washington Courts Should Do When a Capital Defendant Wants to Die*, 68 WASH. L. REV. 735, 750–52 (1993) (supporting appointment of neutral third party to investigate and present mitigating evidence when defendant wishes to bar it).

[215] *See* Hardwick v. Crosby, 320 F.3d 1127, 1189–90 (11th Cir. 2003); Silva v. Woodford, 279 F.3d 825, 838 (9th Cir. 2002); Coleman v. Mitchell, 268 F.3d 417, 445–50 (6th Cir. 2001); Battenfield v. Gibson, 236 F.3d 1215, 1226–30 (10th Cir. 2001); *see also* Marshall v. Hendricks, 307 F.3d 36, 103 (3d Cir. 2002) (rejecting defendant's claim of ineffective assistance of counsel based on counsel's failure to prevent specific types of mitigating evidence); State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002) (setting a high standard with respect to knowing and intelligent condition of waiver). *But see* Anderson v. State, 574 So. 2d 87, 95 (Fla. 1991) (stating that no inquiry into voluntariness is necessary when represented defendant wishes to preclude presentation of mitigating evidence).

[216] *Marshall*, 307 F.3d at 103; *Battenfield*, 236 F.3d at 1226–30.

[217] *See generally* State v. Wilkinson, 474 S.E.2d 375 (N.C. 1996).

what, in essence, is "suicide by jury."[218] Wilkinson had been sentenced to death for murders committed in the course of burglary and rape.[219] While North Carolina courts generally evince a very strong preference for allocating decisions to defendants,[220] the *Wilkinson* court upheld the trial court's allocation of the decision to present mitigating witnesses to Wilkinson's lawyer.[221] The court found, somewhat unpersuasively in light of the record, that Wilkinson insufficiently stated his determination not to present mitigating evidence:

> MR. MCGLOTHLIN [defense counsel]: . . . Mr. Wilkinson has certain desires on phase two which are inconsistent with what Mr. Carter and I feel [is] our responsibility as his lawyers . . . . He instructed us at one time this past weekend not to put on certain evidence we had, certain witnesses. We have expert witnesses. And we would like some guidance from the Court as to what our responsibilities are when our client instructs us in this matter . . . .
>
> THE COURT: . . . Your attorneys have indicated that you have certain desires in respect to a sentencing proceeding. What are those at this time?
>
> THE DEFENDANT: Your Honor, first of all I would like to have these extra motions dismissed. I just don't see the need for it. I'm guilty of what I'm charged with. I've already said that . . . . I just want to make it as simple as possible and as easy as possible and get this over with as quickly as possible. And I do want my lawyers to represent me. And I think they've done a good job. As far as the sentencing, I would just like to . . . .
>
> THE COURT: Well, at this time I'm going to enter a general directive to your attorneys to simply proceed to offer the evidence that they have developed in respect to any issues on mitigating circumstances that appear of record. They have a duty both as . . . attorneys and as officers of the Court to at least do that on your behalf . . . . For our present purposes, I'm going to direct them to proceed with the evidence they've developed. All right, sir?

---

[218] *Id.*; Joseph E. Wilhelm & Kelly L. Culshaw, *Ohio's Death Penalty Statute: The Good, the Bad, and the Ugly*, 63 OHIO ST. L.J. 549, 617 (2002) (noting societal interest that criminal defendants not use the death penalty as a form of state-assisted suicide).

[219] *Wilkinson*, 474 S.E.2d at 379.

[220] State v. White, 508 S.E.2d 253, 271, 273 (N.C. 1998) (allocating even the decision as to what questions to ask to the defendant).

[221] *Wilkinson*, 474 S.E.2d at 382.

THE DEFENDANT: All right. Thank you.[222]

The trial lawyers then presented the evidence Wilkinson wanted to block. On appeal, Wilkinson argued that his sentence should be reversed because the trial court took from him the authority to make a decision that North Carolina law clearly commits to defendants.[223] In affirming the death sentence, the North Carolina Supreme Court conformed to a sub–theme which holds defendants to a high standard of clarity when they wish to prevent the presentation of mitigating evidence.[224] However, in this case the sub–theme atypically operated against mercy in the appellate court, as the court affirmed Wilkinson's death sentence.

The discussion thus far has neglected to distinguish two different versions of a defendant's decision not to call mitigating witnesses. Some defendants try to keep any mitigating witnesses from testifying, while still opposing imposition of a death sentence.[225] Other defendants try to keep any mitigating witnesses from testifying because, after conviction for capital murder, they prefer a death sentence to any of the remaining grim alternatives.[226] Defendants of the first kind clearly are trying to control an evidentiary decision. Defendants of the second kind, however, seem be contesting a different decision, even though it takes the form of a dispute about calling witnesses.

Defendants who want a death sentence are really making a deliberation–structuring decision. They wish to control the choices available to the sentencing jury by withdrawing defense opposition to it, leaving only the choice of death.[227] The case of Vietnam veteran Wayne Felde, convicted of capital murder in Louisiana, illustrates how a defendant may use closing argument to control the choices available to the jury.[228] The guilt–phase jury had rejected a defense focused on Felde's post–traumatic stress disorder.[229] Felde made the following final argument to the sentencing jury:

---

[222] *Id.* at 381.

[223] *Id.*

[224] *Id.* at 399–400.

[225] Grim v. State, 841 So. 2d 455, 459 (Fla. 2003); Chandler v. State, 702 So. 2d 186, 191 (Fla. 1997).

[226] *See, e.g.*, Felde v. Butler, 817 F.2d 281, 282 (5th Cir. 1987); Autry v. McKaskle, 727 F.2d 358, 361 (5th Cir.1984); People v. Sanders, 797 P.2d 561, 592 (Cal. 1990); State v. Shafer, 969 S.W.2d 719, 738 (Mo. 1998) (en banc); State v. Keith, 684 N.E.2d 47, 55 (Ohio 1997); Wallace v. State, 935 P.2d 366, 370 (Okla. Crim. App. 1997); Commonwealth v. Sam, 635 A.2d 603, 611 (Pa. 1993).

[227] *See infra* Part II.D discussing the allocation of deliberation–structuring decisions.

[228] *Felde*, 817 F.2d at 282.

[229] *Id.*

> All I have to say is . . . whether you all believed what we'd said throughout this defense or not, it is true. There are two hundred thousand other veterans suffering with it and I'm sorry you didn't believe it but, however, I do pray that you will come back with the death penalty. I'm not coming out and threatening anybody because that's not what it is. A walking time bomb, that's what it is. Somebody else will die as a result of it if I'm not put to death, I am sure. It's happened twice in eight years. There's been ten years of proof shown to you. I don't know where it went so, please, return that. I think, as countrymen, you owe me that much. I did my part. Please do yours. Okay? Thank you. Thank you, Judge Humphries, for a fair trial.[230]

No court opinions acknowledge the different motivations that induce capital defendants to oppose the presentation of mitigating testimony. No court makes the allocation of the mitigating witness decision dependent upon the nature of the defendant's reason for opposing such testimony. Courts act correctly in refusing to make the allocation of the witness decision depend on the defendant's motivation because, for the reasons set out below, lawyers should control both mitigating witness and deliberation–structuring decisions. The difference in motivation, thus should not cause any difference in allocation.

In general, a coherent scheme should allocate ultimate control over evidentiary decisions and deliberation–structuring decisions to the same person. If evidentiary decisions and deliberation–structuring decisions were allocated separately—one to the lawyer and the other to the defendant—the law would thereby create the worst of all possible worlds, protecting neither reliability nor dignity. For example, imagine that the law gave the lawyer control over evidentiary decisions, while giving the defendant control over the deliberation–structuring decision of how to argue the penalty issue to the jury. The lawyer would possess the power to introduce mitigating testimony against the defendant's will and thereby wound the defendant's dignity. However, the defendant could, like Felde, prevent the lawyer from using closing argument to explain that mitigating testimony to the jury, thereby undermining the reliability of deliberations and the resulting sentence.

The only evidentiary decision defendants should control is the decision of whether the defendant will testify. The assignment of that evidentiary

---

[230] *Id.* at 285. Felde was executed in 1988. Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 137 (2002) (listing Felde's 1988 execution among botched electrocutions).

decision to defendants does impose a cost to reliability, but it is a necessary cost in light of this article's conclusion that the law must vindicate the very significant dignity interest defendants have in making decisions about their personal participation in trial.[231] In other instances, however, the law should not allocate to separate persons the ultimate authority over such closely–related decisions.

3. *Decisions About How to Question Witnesses*

The pattern of allocation observed in witness–calling decisions appears in a substantially similar form with respect to witness–questioning decisions. The case law generally favors the allocation of questioning decisions to lawyers. However, there is authority to the contrary which enjoys especially strong support in the context of capital punishment.

The *ABA Standards* provide that "[s]trategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross–examination . . . and what evidence should be introduced."[232] The references to cross–examination and the introduction of evidence as decisions that "should be made by defense counsel" supports the allocation of witness–questioning decisions to lawyers.[233]

Though it has not expressly decided the issue, the Supreme Court also seems to favor allocation of questioning decisions to lawyers. In his separate opinion in *Brookhart v. Janis*,[234] Justice Harlan declared that "a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval. The decision, for example, whether or not to cross–examine a specific witness is, I think, very clearly one for counsel alone."[235] Even Justice Brennan, who tends to favor allocation of decisions to defendants, believed that lawyers should decide whether and how to question witnesses, at least insofar as those decisions must be made quickly:

> In the course of a trial, however, decisions must often be made in a matter of hours, if not minutes or seconds. From the standpoint of effective administration of justice, the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must

---

[231] *See infra* Part III.B.

[232] ABA STANDARDS FOR CRIMINAL JUSTICE 4–5.2(b) (1993).

[233] Uphoff, *supra* note 8, at 769 (preserving substantial area of lawyer's craft for lawyer decision making).

[234] Brookhart v. Janis, 384 U.S. 1 (1966).

[235] *Id.* at 8 (Harlan, J., dissenting).

be made quickly in the course of a trial.[236]

In *Henry v. Mississippi*,[237] the Supreme Court further supported allocating questioning decisions to counsel in declaring that only "where the circumstances are exceptional" would tactical or strategic decisions made by counsel, even without consultation with the defendant, not bind the defendant.[238] The Court did not explain, however, what constitutes "exceptional circumstances."

Lower courts have also frequently declared that decisions about the questioning of witnesses belong to defense counsel.[239] The court in *Rhay v. Browder*[240] explained that

> when a defendant has counsel, . . . it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is of the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there.[241]

Some courts extend the principle to allow counsel to stipulate to the testimony of a prosecution witness, thereby waiving the defendant's right to confront that testimony.[242] In *People v. Campbell*, for example, the court held that counsel could stipulate, without the defendant's consent, to the testimony of a prosecution witness.[243] The court did, however, limit that power to stipulations that do not amount to guilty pleas.[244]

Other courts disagree and hold that the decision of whether to stipulate

---

[236] Jones v. Barnes, 463 U.S. 745, 760 (1983) (Brennan, J., dissenting).

[237] Henry v. Mississippi, 379 U.S. 443 (1965).

[238] *Id.* at 451–52.

[239] Wilson v. Gray, 345 F.2d 282, 286 (9th Cir. 1965); Cruzado v. Puerto Rico, 210 F.2d 789, 791 (1st Cir. 1954); Fukunaga v. Territory of Hawaii, 33 F.2d 396, 397 (9th Cir. 1929); United States *ex rel.* Jones v. Meyers, 226 F. Supp. 343, 344 (E.D. Pa. 1964); People v. Murphy, 503 P.2d 594, 607 (Cal. 1972); People v. Ramey, 604 N.E.2d 275, 281 (Ill. 1992).

[240] Rhay v. Browder, 342 F.2d 345 (9th Cir. 1965).

[241] *Id.* at 349.

[242] United States v. Calabro, 467 F.2d 973, 985–86 (2d Cir. 1972); Poole v. Fitzharris, 396 F.2d 544, 545–46 (9th Cir. 1968); People v. Campbell, 773 N.E.2d 218, 223 (Ill. App. Ct. 2002), *aff'd*, 802 N.E.2d 1205 (Ill. 2003), *cert. denied*, 125 S. Ct. 149 (2004).

[243] *Campbell*, 773 N.E.2d at 223.

[244] *Id.* An example of such a situation is when the State's entire case is to be presented by stipulation. For defendant to agree in all aspects of the case is tantamount to admitting guilt.

to the testimony of a prosecution witness belongs to the defendant.[245] In *Carter v. Sowders*,[246] the Sixth Circuit wrote that even if defense counsel's actions

> could constitute a waiver of the defendant's rights under the Confrontation Clause, the waiver would not bind [the defendant] in the absence of a showing that he consented. As the Supreme Court stated in *Faretta v. California*: "It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him'. . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[247]

When the death sentence looms, however, it appears that courts tend to allocate to the defendant decisions about how to question mitigation witnesses.[248] During the penalty phase of *State v. White*,[249] defense counsel called White's aunt to testify about the history of domestic violence and abuse in the family while White was growing up.[250] White told the judge that he did not want his lawyers to elicit that testimony, explaining that

> [m]y family as far as that goes have nothing to do with this case at all . . . [;] what they did, ain't got nothing to do with this right here. I don't feel like it should be brought out. I don't feel like it should come before anybody in this courtroom. Not even you.[251]

White further insisted that testimony about childhood abuse he had suffered would conflict with his guilt–phase claim of innocence. By the time of the penalty–phase discussion, the jury had of course already convicted White of murder and rejected his guilt–phase defense. Still, the

---

[245] *E.g.*, United States v. Stephens, 609 F.2d 230, 232–33 (5th Cir. 1980); Phillips v. Wyrick, 558 F.2d 489, 496 (8th Cir. 1977); Dean v. Commonwealth, 777 S.W.2d 900, 902–03 (Ky. 1989), *overruled in part by* 120 S.W.3d 635 (Ky. 2003); DeRosa v. First Judicial Dist., 985 P.2d 157, 163 (Nev. 1999), *overruled in part by* 100 P.3d 658 (Nev. 2004); Raquepaw v. State, 843 P.2d 364, 366 (Nev. 1992).

[246] Carter v. Sowders, 5 F.3d 975 (6th Cir. 1993).

[247] *Id.* at 981–82 (citations omitted).

[248] *See, e.g.*, Tilley v. State, 963 P.2d 607, 616 (Okla. Crim. App. 1998) (holding that guidelines require that a court determine whether the defendant understands the effect of failing to present mitigating evidence); State v. Arguelles, 63 P.3d 731, 754 (Utah 2003).

[249] State v. White, 508 S.E.2d 253 (N.C. 1998).

[250] *Id.* at 271.

[251] *Id.*

trial court ordered counsel not to ask White's aunt about any childhood abuse.[252] White was sentenced to death, and the North Carolina Supreme Court affirmed the judgment.[253]

The North Carolina court's judgment follows that jurisdiction's exceptionally strong preference for allocating all decisions to defendants in the event of an attorney–client impasse.[254] The allocation of witness–questioning decisions to capital defendants, however, makes less sense in jurisdictions that assign such decisions to counsel in non–capital cases. One finds no explanation in the case law that reconciles these two lines of authority.

Perhaps, in the minds of judges, there is a sense that lines of questioning of mitigating witnesses touch a defendant's dignity much more deeply than does any conceivable line of questioning about prosecution evidence or a guilt–phase defense. It takes no special powers of imagination to understand something about the predicament of the capital defendant in a case involving such evidence. That defendant, already deeply shamed by the guilt–phase public airing of the horrible details of his crime, next faces the prospect of seeing his own lawyers systematically demolish the carefully constructed pretense of wholesome normality which exists least in the troubled homes that cherish it most. It is no wonder that the capital defendant, now despised by the world for his crime, rarely relishes watching his last companions—his family—attacked for the suffering they visited upon him in years past.

However, the Constitution and experience teach that the defendant's past is usually relevant to the jury's decision of whether he must die for his crime.[255] Thus, society's interest in the accuracy of that decision rises in proportion to the gravity of the wound inflicted upon the defendant's dignity by the mitigation case. The problem admits of no easy answer.

4. *Decisions of Whether to Raise Objections to Prosecution Evidence*

The final sub–category of evidentiary decisions discussed here includes decisions about whether to seek suppression of prosecution evidence. Most authorities allocate those decisions to lawyers, but a few assign such decisions to defendants.

The *ABA Standards* clearly seem to assign such decisions to lawyers by providing that "[s]trategic and tactical decisions should be made by defense

---

[252] *Id.* at 271–73.

[253] *Id.* at 258.

[254] *See supra* notes 180 and 187.

[255] *E.g.*, Wiggins v. Smith, 539 U.S. 510, 535–37 (2003).

counsel after consultations with the client where feasible and appropriate. Such decisions include . . . what trial motions should be made . . . ."[256]

The courts are split as to whether decisions to seek suppression of evidence belong to lawyers or defendants. Many courts assign those decisions to the lawyer.[257] In *People v. Turner*,[258] for example, Turner wanted his lawyer to file a motion to suppress certain prosecution evidence. The lawyer refused to do so, finding no plausible grounds for such a motion.[259] On appeal, the court declared the matter tactical, even though the defendant's constitutional rights were involved because the claim challenged the constitutionality of a search.[260] Thus, the court drew a sharp distinction between Turner's competing interests: his Fourth Amendment interest in the privacy of his home, and his interest in the use of the exclusionary rule to bar the fruits of the search. Had the lawyer been present in Turner's home at the time of the search, and at that moment sought to waive Turner's Fourth Amendment rights by consenting to the search over Turner's objection, the court apparently would have found that the lawyer acted beyond his authority. However, if in subsequent criminal proceedings the fruits of that search were offered against Turner, the court would have found that the lawyer had the power to waive objection, even against Turner's wishes. Fundamentally, the court justified the change in the assignment by recognizing that the latter decision arises in the context of adversary criminal proceedings.[261]

A few courts, however, allocate decisions about whether to challenge evidence to defendants, at least when the challenge claims a violation of the defendant's constitutional rights.[262] Two premises motivate those courts to

---

[256] ABA STANDARDS FOR CRIMINAL JUSTICE 4–5.2(b) (3d ed. 1993).

[257] United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993) (discussing whether to object to prosecution introducing to the jury excerpts from the film *The Deerhunter*); Curry v. Wilson, 405 F.2d 110, 112–13 (9th Cir. 1968) (discussing whether counsel must move to suppress statements); Jarrell v. Boles, 272 F. Supp. 755, 758 (N.D. W. Va. 1967) (discussing whether to move to suppress statements); People v. Lanphear, 608 P.2d 689, 697 (Cal. 1980), *vacated by* 449 U.S. 810 (1980) (discussing whether an objection should be made); State v. Johnson, 714 S.W.2d 752, 765–66 (Mo. Ct. App. 1986) (discussing whether to object to hearsay). *But see* Lovett v. Foltz, 687 F. Supp. 1126, 1135–37 (E.D. Mich. 1988), *aff'd*, 884 F.2d 579 (6th Cir. 1989) (finding that an attorney's failure to challenge a witness's testimony did not constitute ineffective assistance of counsel).

[258] People v. Turner, 10 Cal. Rptr. 2d 358 (Ct. App. 1992).

[259] *Id.* at 360.

[260] *Id.* at 362–63.

[261] *Id.* at 362–63.

[262] *E.g.*, United States *ex rel.* Snyder v. Mazurkiewicz, 413 F.2d 500, 502 (3d Cir. 1969); Reeves v. Warden, 346 F.2d 915, 926–27 (4th Cir. 1965); State v. Mendes, 210 A.2d

allocate such decisions to defendants. First, they believe the defendant's constitutional rights are implicated as much in the use of illegally-seized evidence at trial as in the illegal seizure itself. Second, they use the rubric of constitutional rights to identify those rights that cannot be waived by counsel against the wishes of the defendant.

C. *Decisions Involving the Defendant's Direct, Personal Participation*

The next category includes decisions about the represented defendant's direct, personal participation at trial. This category includes only those activities which no one but the defendant can perform, such as appearing at trial or testifying. Those activities which the defendant, if the law allowed it, could perform personally, such as questioning witnesses or making motions are excluded from this category. Those activities that the law could allocate to the lawyer are discussed in other sections.

The weight of authority allocates to the defendant the decision of whether to appear at trial. Here, as elsewhere, a significant minority view exists allocating the decision to the lawyer. With respect to the decision of whether the defendant will testify, a substantial consensus exists allocating that decision to the defendant.

1. *The Decision of Whether the Defendant Will Attend Trial*

The Constitution protects the right of a defendant to attend trial.[263] In *Hopt v. Utah*,[264] the Supreme Court reversed a murder conviction where the defendant was absent during a portion of jury selection.[265] Writing for the Court, the first Justice Harlan declared that the defendant's

> life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only . . . . We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial.[266]

50, 53, 56 (R.I. 1965); *see also* Uviller, *supra* note 21, at 774–76 (discussing mistrial example).

[263] U.S. CONST. amend. VI.

[264] Hopt v. Utah, 110 U.S. 574 (1884).

[265] *Id.* at 583.

[266] *Id.* at 578–79.

Thus, *Hopt* recognized a right of presence waivable neither by lawyer nor by client because of the possibility that the defendant might aid counsel in making defense decisions. But that justification alone does not support the other element of the *Hopt* rule which bars even the defendant from waiving his right to be present.[267] To support that element, the Court explained that society, as well as the defendant, has an interest in the justice of the defendant's punishment:[268]

> The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offenses of the same kind. Such being the relation which [sic] the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution.[269]

Thus, in *Hopt* the decision about defendant's presence at trial was taken from the defense altogether; the defendant had to be present, and neither counsel nor defendant could waive that right.[270]

The Supreme Court later limited *Hopt*, returning the decision to the defense and noting that, in some circumstances, the Constitution did not guarantee a defendant's right to be present.[271] In *Snyder v. Massachusetts*, Justice Cardozo wrote that "[s]o far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to

---

[267] *Id.*

[268] *Id.* at 579.

[269] *Id.*

[270] *See also* Lewis v. United States, 146 U.S. 370, 372 (1892) ("[I]n felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial.").

[271] *See* Kentucky v. Stincer, 482 U.S. 730, 747 (1987) (holding there is no constitutional right to be present at hearing on competency of testifying witnesses); United States v. Gagnon, 470 U.S. 522, 526 (1985) (holding there is no constitutional right to presence at discussion between judge and juror); Illinois v. Allen, 397 U.S. 337, 342–43 (1970) (holding that right to presence may be waived by bad courtroom behavior); Snyder v. Massachusetts, 291 U.S. 97, 108 (1934) (holding there is no constitutional right to presence at the jury's view of a murder scene), *overruled in part by* 378 U.S. 1 (1964); Diaz v. United States, 223 U.S. 442, 445 (1912) (finding that the right to presence may be waived by the defense).

that extent only."[272] In *Taylor v. Illinois*,[273] the Court, in dicta, suggested that the decision of whether to waive the defendant's presence belongs to the defendant personally.[274] However, the Supreme Court has not specifically decided that question.

Lower courts have considered the specific question of whether counsel may waive a defendant's right to be present; some hold that counsel may waive that right.[275] In *State v. Levato*, the Arizona Supreme Court assigned the decision to counsel, reasoning that:

> an unalterable rule requiring consultation between counsel and the defendant before the client's right may be waived would interfere with trials, would frustrate the policy of efficient judicial administration, and would disserve the courts, attorneys, and litigants who appear in court—including criminal defendants. To rule otherwise would potentially force the trial judge to interrupt the proceedings whenever a waiver might be occurring in order to protect the record on appeal.[276]

Other courts assign the decision about presence to the defendant.[277]

Some confusion remains, however, insofar as courts tend not to allow defendants to elect to be absent from trial.[278] Of course, a defendant, by misbehavior, has the power to leave the courtroom,[279] but courts have been reluctant to make that power a *right* to leave. This article's proposal that courts should allocate more decisions to lawyers necessarily implies that

---

[272] *Snyder*, 291 U.S. at 107–08.

[273] Taylor v. Illinois, 484 U.S. 400 (1988).

[274] *See id.* at 417–18.

[275] *E.g.*, State v. Levato, 924 P.2d 445, 448–49 (Ariz. 1996); People v. Kidd, 610 N.Y.S.2d 116, 117 (App. Div. 1994); People v. Webb, 520 N.Y.S.2d 629, 630 (App. Div. 1987).

[276] *Levato*, 924 P.2d at 448 n.3 (citations omitted).

[277] *E.g.*, Carter v. Sowders, 5 F.3d 975, 981 (6th Cir. 1993); Larson v. Tansy, 911 F.2d 392, 396–97 (10th Cir. 1990); Don v. Nix, 886 F.2d 203, 207–08 (8th Cir. 1989); United States v. Crutcher, 405 F.2d 239, 243 (2d Cir. 1968); Cross v. United States, 325 F.2d 629, 632 n.8 (D.C. Cir. 1963); State v. Ware, 498 N.W.2d 454, 547 (Minn. 1993).

[278] United States v. Meinster, 481 F. Supp. 1112, 1115 (S.D. Fla. 1979) (finding no right to be absent, but court may in its discretion permit defendant to be absent); State v. Randle, 603 N.W.2d 91, 93–94 (Iowa 1999) (citing authority in other jurisdictions). *But see* State v. Ayer, 834 A.2d 277, 282–93 (N.H. 2003) (reversing murder conviction where trial court refused to allow defendant to represent himself because of his intention to absent himself from trial), *cert. denied*, 124 S. Ct. 1668 (2004).

[279] Taylor v. United States, 414 U.S. 17, 20 (1973); Illinois v. Allen, 397 U.S. 337, 342–43 (1970).

courts should exercise their discretion to allow defendants to be absent, at least where the reason for the absence arises from a disagreement about the course of the defense.

I close this discussion with an observation about the Rivers case, with which this article began. Counsel in that case observed in Rivers a sense of enormous embarrassment in any public discussion of his sexuality, and the possibility that his relationship with the victim had any sexual component. Rivers said he could not endure sitting in the courtroom while his counsel made such claims about him. However, under a rule leaving with the defendant the choice of whether to attend trial, Rivers could have absented himself from his trial entirely or in part, and thereby diminished the sharpest edge of the anticipated humiliation. That solution, of course, has its drawbacks; some humiliations remains just because he knows that a despised defense is being made in his name, albeit not in his presence. Further, there is a price to be paid in terms of appearances before the jury and ease of consultation with counsel when the defendant is not in the courtroom. Nevertheless, the rule yielding to the defendant the choice of whether to appear returns to the defendant some measure of control over his own dignity.

2. *The Decision of Whether the Defendant Will Testify*

A substantial consensus exists assigning to the defendant the decision of whether to testify. The various standards of professional responsibility agree with this consensus,[280] and the Supreme Court has also listed the decision as belonging to the defendant.[281] In *Rock v. Arkansas*, the Court cited *Faretta* and described as follows the importance of a defendant's right to decide whether to testify:

> Even more fundamental to a personal defense than the right of self representation . . . is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself

---

[280] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003); ABA STANDARDS FOR CRIMINAL JUSTICE 4–5.2(a) (3d ed. 1993); *see generally* White, *supra* note 34, at 76 (recommending that lawyer should decide).

[281] *See, e.g.*, Rock v. Arkansas, 483 U.S. 44, 53 n.10 (1987); Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) ("Only such basic decisions as whether to testify in one's own behalf are ultimately for the accused to make.").

> as a witness . . . . Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.[282]

In so ruling, the *Rock* Court acknowledged that constitutional law in this respect has evolved substantially from the time of the Founders.[283] In those days, under the common law, criminal defendants were disqualified from testifying because of their interest in the outcome of the trial.[284]

Not surprisingly, in light of that evolution of the law, many of the lower court decisions which allocate to lawyers the decision of whether a defendant should testify predate the constitutional developments of the last thirty–five years.[285] More recent lower court decisions primarily support allocation of this key decision to the defendant.[286]

---

[282] *Rock*, 483 U.S. at 52 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).

[283] *Id.* at 50.

[284] Ferguson v. Georgia, 365 U.S. 570, 574 (1961).

[285] *See, e.g.*, United States v. Martinez, 883 F.2d 750, 756–57 (9th Cir. 1989), *vacated by* 928 F.2d 1470 (9th Cir. 1991); United States v. Rantz, 862 F.2d 808, 810–11 (10th Cir. 1988) (holding that the decision belongs to the lawyer where the lawyer believes the client will testify perjuriously); United States v. Poe, 352 F.2d 639, 641 (D.C. Cir. 1965); United States v. Gargulio, 324 F.2d 795, 797 (2d Cir. 1963); Sims v. State, 208 N.E.2d 469, 472 (Ind. 1965); Kinder v. Commonwealth, 269 S.W.2d 212, 213–14 (Ky. 1954); State v. Albright, 291 N.W.2d 487, 492 (Wis. 1980) (concluding, before *Rock v. Arkansas*, that "counsel . . . may waive the defendant's right to testify"); *see also* Seth Dawson, Comment, *Due Process v. Defense Counsel's Unilateral Waiver of the Defendant's Right to Testify*, 3 HASTINGS CONST. L.Q. 517, 529 (1976).

[286] *See, e.g.*, United States v. Mullins, 315 F.3d 449, 454–55 (5th Cir. 2002), *cert. denied*, 124 S. Ct. 2096 (2004); United States v. Ortiz, 82 F.3d 1066, 1070 (D.C. Cir. 1996); United States v. Pennycooke, 65 F.3d 9, 10–11 (3d Cir. 1995) (noting, however, that trial court has no obligation to ensure that nontestifying defendant's waiver was knowing and intelligent by explaining the right); Lema v. United States, 987 F.2d 48, 52 (1st Cir. 1993) (assuming, without holding, that the right to testify may not be waived by counsel); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987); United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 118–19 (3d Cir. 1977); United States v. Dougherty, 473 F.2d 1113, 1128 (D.C. Cir. 1972); Poe v. United States, 233 F. Supp. 173, 176 (D.C. Cir. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965); United States v. Lore, 26 F. Supp. 2d 729, 734–38 (D. N.J. 1998); Hughes v. State, 513 P.2d 1115, 1119 (Alaska 1973); State v. Noble, 514 P.2d 460, 462 (Ariz. 1973); People v. Robles, 466 P.2d 710, 716 (Cal. 1970) (holding that attorney is to decide whether defendant will testify, but that the defendant cannot be deprived of this right if he insists on testifying); State v. Curtis, 681 P.2d 504, 513 (Colo. 1984); State v. Rosillo, 281 N.W.2d 877, 878–79 (Minn. 1979); Culberson v. State, 412 So. 2d 1184, 1186 (Miss. 1982); Ingle v. State, 546 P.2d 598, 600 (Nev. 1976) (holding that the decision whether to testify is typically the attorney's, but a defendant cannot be denied the opportunity to testify); State v. Neuman, 371 S.E.2d 77, 81

The Eleventh Circuit has considered the question perhaps more fully than any other court. Before the division of the old Fifth Circuit which created the Eleventh Circuit, the Fifth Circuit had, in dictum at least, assigned the decision to defendants.[287] In *Wright v. Estelle*,[288] two distinguished judges turned their attention and their powers of expression to the problem. In that case, the *en banc* court affirmed a panel decision that assumed, without explicitly holding, that the decision belonged to the defendant.[289] In a concurring opinion, Judge Thornberry, joined by four other judges, argued that the decision belonged to the lawyer. He began by explaining society's interest in assuring the best possible defense to accused persons. By choosing to accept counsel at all, he reasoned:

> [T]he defendant has necessarily delegated important decisionmaking authority to his attorney. The scope of the delegation does not turn on the importance of the decision—the attorney frequently makes judgments affecting the very life of the defendant. The question here is twofold: who is in a better position to judge trial strategy and who is in a better position to ensure the best interests of the defendant. This court's history is filled with the recognition of the value of an attorney. No one could seriously contend that a defendant is in a better position to dictate trial strategy than his attorney. Moreover, a court-appointed attorney owes a duty to society to see that his client is given the best possible defense within the law. No attorney could discharge this duty if he must yield to the personal demands of his client.[290]

After invoking society's interest, Judge Thornberry stated the empirical premise that counsel best knows how to defend a charge:

> Trial attorneys are professional artisans working in a highly competitive arena that requires all the skills which education, training, and experience have given them. Criminal defendants are entitled to no less. A defendant

---

(W. Va. 1988); *see also* Timothy P. O'Neill, *Vindicating the Defendant's Constitutional Right to Testify at Criminal Trial: The Need for an On-the-Record Waiver*, 51 U. PITT. L. REV. 809 (1990).

[287] Winters v. Cook, 489 F.2d 174, 179 (5th Cir. 1974) (stating that the defendant's right to testify is "such an inherently personal fundamental right that it can be waived only by the defendant and not by his attorney").

[288] Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978) (en banc).

[289] *Id.* at 1072 (adopting panel decision, reported at 549 F.2d 971, 972, 974 (5th Cir. 1977), which did not explicitly hold that the decision belonged to defendant, but found that lawyer's usurpation of the decision to be harmless error).

[290] *Id.* at 1073 (Thornberry, J., concurring).

> has a right to necessary surgery, but he does not have the right to require the surgeon to perform an operation contrary to accepted medical practice. If, despite his counsel's advice, a defendant continues to believe that his testimony is more important than the continued services of an attorney who insists he should not take the stand, the conflict must be resolved by the court. Only in this way may the right to testify be reconciled with the right to effective assistance of counsel .... While *Faretta* allows a defendant to have a fool for a client, there is nothing in its logic that commands that the defendant may also have a fool for an attorney.... We are here concerned with constitutional requirements and there is no constitutional requirement that a court–appointed attorney must walk his client to the electric chair.[291]

In dissent, Judge Godbold, joined by two other judges, argued for assignment of the decision to the defendant. First, he disputed Judge Thornberry's assumption that counsel possesses a superior ability to present the best defense:

> In the narrow world of the courtroom the defendant may have faith, even if mistaken, in his own ability to persuasively tell his story to the jury. He may desire to face his accusers and the jury, state his position, and submit to examination. His interest may extend beyond content to the hope that he will have a personalized impact upon the jury or gain advantage from having taken the stand rather than to seek the shelter of the Fifth Amendment.[292]

Judge Godbold further noted the possibility that a defendant might have interests different and broader than the presentation of the best defense:

> [W]ithout regard to impact upon the jury, his desire to tell "his side" in a public forum may be of overriding importance to him. Indeed, in some circumstances the defendant, without regard to the risks, may wish to speak from the stand, over the head of judge and jury, to a larger audience. It is not for his attorney to muzzle him .... [O]ur history is replete with trials of defendants who faced the court, determined to speak before their fate was pronounced: Socrates, who condemned Athenian justice heedless of the cup of hemlock; Charles I, who challenged the jurisdiction of the Cromwellians over a divine monarch; Susan B. Anthony, who argued for the female ballot; and Sacco and Vanzetti, who revealed the flaws of their tribunal. To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice. I cannot accept a decision that allows a jury to condemn to death or imprisonment a defendant who

---

[291] *Id.* at 1073–74 (Thornberry, J., concurring) (citations omitted, italics added).

[292] *Id.* at 1078 (Godbold, J., dissenting).

> desires to speak, without ever having heard the sound of his voice . . . . Judge Thornberry's observation that the attorney need not walk his client to the electric chair is a striking phrase, but is based upon an erroneous premise. It is the defendant's day in court, not the lawyer's.[293]

The *Wright* debate was seemingly resolved in *United States v. Scott*,[294] wherein the Eleventh Circuit assigned the decision to the defendant.[295] The court declined to reach the question of whether the decision should belong to counsel when counsel's reason for not allowing the defendant to testify is based upon a refusal to participate in perjury.[296] Thus, as with so many other problems of allocation, the controversy resisted final resolution.

In *United States v. Teague*,[297] the Eleventh Circuit again split over allocating the decision of whether the defendant will testify. The majority followed Judge Godbold in allocating the decision to the defendant.[298] In summary, the majority wrote that "[b]y exercising his constitutional right to the *assistance* of counsel, a defendant does not relinquish his right to set the parameters of that representation. Any other conclusion would be 'to imprison a man in his privileges and call it the Constitution.'"[299]

Judge Edmondson, joined by two others, rejected the majority's reasoning. He regarded the right–to–testify decision as encompassing only the right to be free from government interference, not the right to be free of interference from one's own lawyer.[300] The line between the prerogatives of counsel and client lies, according to Edmondson, on the far side of the decision of whether the defendant should testify:

> I understand and agree that a defendant must personally decide how he will plead to the charges against him, whether he will waive trial by jury, and whether he will appeal. But these decisions are not about trial tactics; they are materially different. These decisions determine whether there is to be a fight and who will judge the fight's outcome. But, once the client decides that there is to be a fight and that he wishes to be represented by a lawyer, I agree with those judges who say that defense counsel need not defer to the client's desires on how the fight is to be waged . . . . To allow the client to decide absolutely whether the client will testify is potentially to nullify all of the lawyer's tactical efforts and to make, in fact, a

---

[293] *Id.* at 1078–80 (Godbold, J., dissenting).

[294] United States v. Scott, 909 F.2d 488 (11th Cir. 1990).

[295] *Id.* at 490.

[296] *Id.* at 491.

[297] United States v. Teague, 953 F.2d 1525 (11th Cir. 1992).

[298] *Id.* at 1532.

[299] *Id.* at 1533 (quoting Adams v. United States, 317 U.S. 269, 280 (1942)).

[300] *Id.* at 1535 (Edmondson, J., concurring).

> mockery of the very idea that a defendant received a competent defense by means of the assistance of counsel. Put differently, allowing the client to override counsel's tactical decisions undercuts the adversarial process that the Constitution attempts to protect as the essential ingredient to a fair trial.[301]

After *Teague*, Judge Edmondson continued, for a time, to assert the error of the ruling assigning to the defendant the testifying decision.[302] By 2000, however, Judge Edmondson evidently changed his mind. That year, he authored an opinion in a capital case in which the court denied an ineffective assistance of counsel claim where counsel deferred to the defendant's decision not to present mitigating evidence.[303]

D. Decisions Involving the Structure of Deliberations

The fourth category includes decisions affecting the possible verdicts available for the factfinder's consideration. Should the defense argue alibi or acknowledge presence at the crime but seek conviction on a lesser–included offense? Should the defense argue that the act was justified self–defense or excusable by reason of insanity? Rather than discuss every conceivable form of deliberation–structuring dilemma, this Section discusses three decisions: (1) the decision of whether to seek a jury instruction on a lesser–included offense; (2) the decision of whether to assert the insanity defense; and (3) the appellate version, involving the decision about which claims to raise an appeal.

1. *The Decision of Whether to Seek Instruction on a Lesser–Included Offense*

Allocation of the decision of whether to seek a verdict on a lesser–included offense, or to put to the jury the choice between conviction and acquittal, presents a complex problem. By way of illustration, consider the case of Anthony Anaya.[304] Charged as an accomplice to first–degree murder, Anaya refused a prosecution offer allowing him to plead guilty to second–degree murder.[305] His attorneys recommended that he take the bargain because his only plausible defense lay in a challenge to the element

---

[301] *Id.* at 1536 (citations omitted).

[302] Nichols v. Butler, 953 F.2d 1550, 1554 (11th Cir. 1992) (Edmondson, J., dissenting).

[303] Gilreath v. Head, 234 F.3d 547, 550–53 (11th Cir. 2000); *see also* Uviller, *supra* note 21, at 760.

[304] State v. Anaya, 592 A.2d 1142 (N.H. 1991).

[305] *Id.* at 1143.

of premeditation. If they succeeded in raising a reasonable doubt as to premeditation, the jury would return a second–degree murder verdict.[306] Accordingly, the lawyers believed that Anaya would not fare any better at trial than he would with the offered second–degree murder plea. Insisting on his complete innocence, Anaya refused the bargain and testified at trial that he had nothing to do with the murder.[307] Anaya's attorneys presented the premeditation defense and asked the jury to convict on the lesser offense of second–degree murder, but the jurors were not convinced.[308] They convicted Anaya of first–degree murder.[309] During post–conviction appeals, Anaya argued that his views should have prevailed, limiting the jury to a choice between conviction for first–degree murder and outright acquittal, preventing his lawyer from arguing for a second–degree murder verdict.[310] The State argued that the attorneys' views, if objectively reasonable, should have prevailed, allowing the lawyers to argue for the second–degree murder verdict, and allowing the jury to consider it.[311]

The problem is complicated by the dual dimensions of the decision. First, there is the question of whether the defense should seek a jury instruction on a lesser–included offense. Second, there is the question of whether the lawyer may advocate for conviction of that lesser offense. In theory, it would be possible to frame a rule that would allow the lawyer, over the defendant's objection, to ask the court to instruct the jury on the elements of the lesser offense without allowing the lawyer, over the defendant's objection, to argue that the jury should return a verdict on that lesser offense.

Indeed, some jurisdictions remove from the defense altogether the decision of whether to seek jury instructions on lesser offenses. In those jurisdictions, the trial court must instruct the jury on lesser offenses for which some evidentiary support exists.[312] In support of the view withdrawing the decision from the parties, one court has written:

---

[306] *Id.* at 1143–44.

[307] *Id.* at 1143.

[308] *Id.* at 1144–45.

[309] *Id.* at 1143.

[310] *Id.* at 1144–45.

[311] *Id.* at 1145–46.

[312] State v. Haanio, 16 P.3d 246, 248 (Haw. 2001); Commonwealth v. Matos, 634 N.E.2d 138, 142 (Mass. App. Ct. 1994); *In re* Trombly, 627 A.2d 855, 857 (Vt. 1993) (stating that even though defendant controls the decision of whether to request a lesser–included–offense instruction, court may override defendant's refusal of such an instruction if it "is so ill–advised that it undermines a fair trial").

> "Our courts are not gambling halls but forums for the discovery of truth . . . ." A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth–ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.[313]

This statement hints at the deeper philosophical debate implicit in the question of whether to allow the defense, or for that matter the prosecution, to limit the possible verdicts available to the jury. Is the truth which the trial seeks to discover and proclaim in the verdict best understood as objective, defined by the nature of the crime as it occurred? As applied to Anaya's case, this view characterizes the trial as aiming to discover whether Anaya was factually involved in the killing and, if so, whether the killing was premeditated. Certainly, courts most often assume that trial outcomes should be measured by their degree of correlation with objective, independently–defined facts.[314] If the trial's principal purpose is discovery of truth, then it makes little sense to allow the litigants to limit the possible verdicts available for the jury's consideration. If lawmakers decide that a fact, such as the presence or absence of premeditation, marks a moral distinction among offenders sufficient to justify different verdicts and sentences, then the factfinder should have the power, in a case where premeditation is at issue, to reach a verdict representative of that truth.

Alternatively, is the truth which the trial seeks to discover and proclaim in the verdict best understood subjectively? This view finds the measure of truth not in the objective facts of the criminal event, but rather in the interests of the litigants as tested by the court rules of procedure and evidence.[315] In Anaya's case, the prosecution declared, by the indictment and by its failure to seek a lesser–offense instruction, that the State's interest lay strictly in convicting Anaya for first–degree murder. Anaya, by his resistance to the second–degree murder plea and argument, declared that

---

[313] People v. Barton, 906 P.2d 531, 536 (Cal. 1995) (citations omitted).

[314] Arizona v. Fulminante, 499 U.S. 279, 308 (1991) (Rehnquist, C.J., delivering the opinion of the Court with respect to Part II); Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

[315] Patton v. United States, 281 U.S. 276, 304 (1930), *overruled in part by* Morico v. United States, 399 U.S. 78 (1970).

his interest lay strictly in obtaining an acquittal.[316] On the interests–based view, a second–degree murder verdict has the weakest claim, because it vindicates neither litigant's interest. Instead, the truth lies in the verdict that emerges from a well–regulated adversarial contest of interests.

I find no logical fallacy in either view that would justify discarding it as simply wrong. The choice between them requires a value judgment about the purpose and stakes of criminal prosecutions. This article argues against the subjective view because of its narrowly individualistic focus, and argues for a view that gives some regard not only to the interests of the litigants, but to the larger community interest in the outcomes of criminal prosecutions.[317] Blackstone stated the view succinctly: "[T]he king has an interest in the preservation of all his subjects."[318]

The second dimension of the lesser–offense decision concerns the lawyer's arguments. May counsel, over the defendant's objection, argue for a verdict on a lesser offense? The argument decision shares some common features with the decision of how to plead. Asking the jury to convict the defendant of a lesser offense amounts, in a certain sense, to an abandonment of the plea of not guilty, for the defense now admits guilt of some offense. Strictly speaking, however, there is a logical distinction between the decision of how to plead and the decision of whether to argue for a lesser offense. In pleading not guilty to the charged offense, a defendant denies culpability for the charged offense; a defendant does not, by that plea, necessarily deny culpability for an offense lesser than that charged.

Some courts seize on the plea–argument relationship to support a rule that no lawyer may, over a defendant's objection, concede the defendant's guilt to the charged offense.[319] Courts bar such concessions because, by the concession, the lawyer essentially withdraws the defendant's plea of not guilty. The problem posed by arguments conceding guilt calls to mind not only the pleading decision discussed above, but also the appellate rule of *Anders v. California*.[320] There, the Supreme Court established a rule that allowed appellate counsel, by the filing of what has since become known as an *Anders* brief, to concede the frivolity of the defendant's appeal.[321]

---

[316] *See Anaya*, 592 A.2d at 1143.

[317] *See infra* Part III.A.

[318] *Patton*, 281 U.S. at 304.

[319] *E.g.*, Wiley v. Sowders, 647 F.2d 642, 650–51 (6th Cir. 1981); People v. Jones, 811 P.2d 757, 771–72 (Cal. 1991) (holding that counsel may make decisions about included offenses, but may not decline to present any guilt–phase defense at all); People v. Hattery, 488 N.E.2d 513, 518 (Ill. 1985); People v. Redmond, 278 N.E.2d 766, 768–69 (Ill. 1972).

[320] Anders v. California, 386 U.S. 738 (1967).

[321] *Id.* at 744.

The reader will recall that many, though not all, jurisdictions allow appellate counsel to file *Anders* briefs. The logic of that position, by analogy, supports a rule allowing trial counsel to concede a defendant's guilt of a charged offense. Indeed, the trial lawyer's concession of guilt in argument often has a stronger tactical justification than does the *Anders* brief. An *Anders* brief concedes frivolity of an appeal in a way that cannot possibly benefit the defendant. On the other hand, concessions by trial counsel as to the defendant's guilt for a charged offense tend to occur in capital prosecutions where counsel hopes to parlay a guilt–phase concession into a penalty–phase advantage.[322]

Even if, by the force of analogy to the pleading decision, lawyers may not concede guilt of the charged offense, the question remains open as to whether they may argue, over a defendant's objection, for conviction of a lesser offense. The *Anaya* case presented precisely that question. The pattern of disagreement observed in the allocation of other defense decisions appears again here. The commentary to the *ABA Standards for Criminal Justice*, invoking the analogy between the pleading decision and the decision about whether to seek a lesser–included offense instruction, proposes that the decision belongs to defendants.[323] Some courts allocate the decision to defendants, often for the same reason.[324] Other courts allocate it to lawyers.[325] The Florida courts go both ways: the decision belongs to

---

[322] *See, e.g.*, People v. Frierson, 705 P.2d 396, 401–06 (Cal. 1985).

[323] ABA STANDARDS FOR CRIMINAL JUSTICE 4–5.2 cmt. (2d ed. 1980). The *ABA Standards* provide that it is "important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses." *See also* Uviller, *supra* note 21, at 728 (recommending that defendant should make the choice of defense because defendant should "elect his own grounds of contention"); White, *supra* note 34, at 74 (suggesting that a defendant should have the final choice in this context because he "has the greatest stake in the outcome").

[324] *Frierson*, 705 P.2d at 404, 405 n.7; People v. Rogers, 363 P.2d 892, 895 (Cal. 1961); People v. Brocksmith, 692 N.E.2d 1230, 1233 (Ill. 1994); State v. Carter, 14 P.3d 1138, 1148 (Kan. 2000); State v. Anaya, 592 A.2d 1142, 1146 (N.H. 1991); State v. Boeglin, 731 P.2d 943, 945 (N.M. 1987); People v. Petrovich, 664 N.E.2d 503, 504 (N.Y. 1996); State v. Harbison, 337 S.E.2d 504, 506–07 (N.C. 1985); *In re* Trombly, 627 A.2d 855, 856–57 (Vt. 1993); State v. Ambuehl, 425 N.W.2d 649, 654 (Wis. Ct. App. 1988).

[325] McNeal v. Wainwright, 722 F.2d 674, 676–77 (11th Cir. 1984); People v. Jones, 811 P.2d 757, 771–73 (Cal. 1991) (indicating that credibility of defendant's preferred defense is a critical factor in determining whether defendant's view may prevail over lawyer's); Van Alstine v. State, 426 S.E.2d 360, 362–63 (Ga. 1993); People v. Siverly, 551 N.E.2d 1040,

defendants when the charged offense carries a possible death sentence, and to lawyers when the charged offense is not capital.[326]

The analogy to the pleading decision does not necessarily lose all application, insofar as the decision to argue for a lesser offense shares qualities with the decision about whether to accept a plea bargain involving a plea of guilty to a lesser offense. As noted above, most courts allocate the decision of whether to accept a plea bargain to the defendant.[327] The decision in *Johnson v. Duckworth* exemplifies a notable exception to that allocation rule.[328]

Perhaps the most significant distinctions between the two decisions arise out of their procedural timing and consequences. The justification for allocating the pleading decision to defendants lies in the fact that the pleading decision either invokes or abandons adversary adjudication. Merely by invoking or waiving adversary adjudication, the defendant does not skew the truth–seeking operations of the criminal process. The truth–seeking function in the case of a guilty plea is protected both by the defendant's confession and by the trial court's independent obligation to confirm the voluntariness of the plea and the existence of a factual basis to support the resulting verdict. However, by the time of jury instruction and closing argument, the adversary process has been engaged, and the trial court has no occasion to conduct such an inquiry. A decision to bar a lesser–offense instruction or the most plausible defense argument in that setting would skew the truth–seeking operations. In a case where some evidence supports a lesser–offense verdict, and where the parties are contesting the defendant's culpability, a decision removing that verdict from the jury's consideration can leave the jury without the ability to return the verdict that most accurately reflects the reality of the crime.

Again, *Anaya*[329] illustrates the point. When Anaya rejected his lawyer's pretrial advice to accept the second–degree murder plea bargain, the trial had not yet taken place and the lawyer's recommendation was based on expected evidence. By the time of closing argument and jury instruction, the

---

1046–47 (Ill. App. Ct. 1990); People v. Jones, 381 N.W.2d 803, 804 (Mich. Ct. App. 1985), *rev'd*, 382 N.W.2d 168 (Mich. 1986); People v. Thompson, 245 N.W.2d 93, 94–95 (Mich. Ct. App. 1976); Alexander v. State, 782 S.W.2d 472, 474 (Mo. Ct. App. 1990); State v. Edwards, 694 N.E.2d 534 (Ohio Ct. App. 1997); State v. Eckert, 553 N.W.2d 539 (Wis. Ct. App. 1996); *see also* Faraga v. State, 514 So. 2d 295, 308 (Miss. 1987).

[326] Reed v. State, 560 So. 2d 203, 206–07 (Fla. 1990).

[327] *See supra* Part II.A.1. The decision of whether to plead guilty to a lesser offense also frequently reflects strategic concerns, but a defendant nonetheless retains control over such a plea. For example, see People v. Rogers, 363 P.2d 892, 895–96 (Cal. 1961).

[328] Johnson v. Duckworth, 793 F.2d 898, 900–02 (7th Cir. 1986).

[329] *See supra* notes 304–16 and accompanying text.

evidence was no longer merely expected, but actually presented. At that point, the decisions confronting the defense were (1) whether to allow the jury to consider all three verdicts supported by the evidence (first–degree murder, second–degree murder, and acquittal) or only two of the three, and (2) whether to argue for the hopeless alternative of acquittal or the plausible alternative of second–degree murder.

The decisions of whether to accept a plea bargain and whether to allow counsel to argue for a lesser offense also differ in their consequences. By accepting a guilty plea a defendant ordinarily waives all appellate adjudication of the charge, but by insisting on a trial and accepting the representation of counsel a defendant retains the right to appellate review. Indeed, the defendant may subsequently bring an ineffective assistance of counsel claim challenging the lawyer's decision to concede guilt of a lesser charge. Thus, if the defendant's preferred defense was not hopeless, as the lawyer assumed, the courts can correct the skewing of the outcome attributable to counsel's poor performance.

The complexities of allocating the lesser–offense decisions have produced unreconciled opinions in some jurisdictions. For example, Illinois courts have variously assigned the decisions to the lawyer and the defendant.[330] Additionally, the Eleventh Circuit has authority supporting both sides of the argument.[331]

2. *The Decision of Whether to Assert the Insanity Defense*

The prosecution of Theodore Kaczynski for his crimes committed as the "Unabomber" raised the question of who should decide whether to assert the insanity defense. Kaczynski's lawyers planned to raise that defense, but Kaczynski wanted no part of it.[332] This controversy and others like it have inspired many law review articles.[333] Before examining that literature and

---

[330] *Compare* People v. Brocksmith, 642 N.E.2d 1230, 1233 (Ill. 1994) (assigning to defendant the decision of whether to seek lesser offense instruction), *with* People v. Siverly, 551 N.E.2d 1040, 1046–47 (Ill. App. Ct. 1990) (assigning the same decision to the lawyer).

[331] *Compare* Mulligan v. Kemp, 771 F.2d 1436, 1441 (11th Cir. 1985) (recognizing defendant's "broad power to dictate the manner" of his defense), *with* McNeal v. Wainwright, 722 F.2d 674, 677 (11th Cir. 1984) (allocating decision whether to argue for lesser offense to lawyer).

[332] Mello, *supra* note 39, at 427.

[333] *E.g.*, Mello, *supra* note 39; Newman, *supra* note 71; Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma when Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1988); Slobogin & Mashburn, *supra* note 77; Uviller, *supra* note 21.

the case law applicable to the present question, a few preliminary observations deserve mention.

The insanity defense is rarely asserted, and even more rarely succeeds.[334] When the defense does succeed, the defendant is often exposed to indefinite confinement in grim institutions that are penal in all but name.[335] Certainly, a lawyer concerned with minimizing adverse consequences to the client should hesitate before opting for a defense that, even when it succeeds, gravely jeopardizes the client's liberty interests.[336]

Many courts let the defendant decide whether to raise an insanity defense.[337] It appears that most commentators[338] and authorities on professional ethics[339] concur with that assignment. However, some courts still allow counsel to control the insanity defense decision.[340] A few

---

[334] Hugh McGinley & Richard A. Pasewark, *National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas*, 17 J. PSYCH. & L. 205, 216 (1989).

[335] *See* Treece v. State, 547 A.2d 1054, 1060 (Md. 1988).

[336] *Cf.* Ross, *supra* note 333, at 1386 n.88.

[337] *E.g.*, United States v. Marble, 940 F.2d 1543, 1547–48 (D.C. Cir. 1991); Alvord v. Wainwright, 725 F.2d 1282, 1289 (11th Cir. 1984); Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983); Snider v. Cunningham, 292 F.2d 683, 685 (4th Cir. 1961); State v. Fayle, 658 P.2d 218, 228–230 (Ariz. Ct. App. 1982); People v. Medina, 799 P.2d 1282, 1301 (Cal. 1990); People v. Geddes, 1 Cal. Rptr. 2d 886, 888 (Ct. App. 1991); Briggs v. United States, 525 A.2d 583, 591 (D.C. 1987); Frendak v. United States, 408 A.2d 364, 378 (D.C. 1979); Jacobs v. Commonwealth, 870 S.W.2d 412, 418 (Ky. 1994); State v. Lowenfield, 495 So. 2d 1245, 1252 (La. 1985); *Treece*, 547 A.2d at 1063; Commonwealth v. Federici, 696 N.E.2d 111, 115 n.4 (Mass. 1998); Johnson v. State, 17 P.3d 1008, 1015 (Nev. 2001); State v. Cecil, 616 A.2d 1336, 1343 (N.J. Super. Ct. App. Div. 1992); People v. Gonzalez, 229 N.E.2d 220, 223 (N.Y. 1967); People v. McMillan, 561 N.Y.S.2d 512, 514 (N.Y. Sup. Ct. 1990); State v. McDowell, 407 S.E.2d 200, 206 (N.C. 1991); State v. Tenace, 700 N.E.2d 899, 908 (Ohio Ct. App. 1997); State v. Peterson, 689 P.2d 985, 991 (Or. Ct. App. 1984); State v. Bean, 762 A.2d 1259, 1266 (Vt. 2000); State v. Jones, 664 P.2d 1216, 1221 (Wash. 1983); State v. Felton, 329 N.W.2d 161, 174 (Wis. 1983); Singer, *supra* note 58, at 673 n.184 (reporting that in England the accused gets to decide whether to raise the insanity defense).

[338] David Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection*, 15 HASTINGS CONST. L. Q. 295, 318 (1988); Mello, *supra* note 39, at 499 (stating that the choice regarding mental state defense belongs to accused); Newman, *supra* note 71, at 83; Ross, *supra* note 333, at 1359 n.64; Singer, *supra* note 58, at 651, 667–68; Slobogin & Mashburn, *supra* note 77, at 1632; Uviller, *supra* note 21, at 744–48 (noting that Justices Brennan and Marshall favor allocation of the decision to raise insanity defense, or any other defense, to defendant).

[339] ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7–6.3 (1989).

[340] *See, e.g.*, Weber v. Israel, 730 F.2d 499, 507–08 (7th Cir. 1984); People v. Merkouris, 297 P.2d 999, 1009 (Cal. 1956); Hendricks v. State, 10 P.3d 1231, 1236 (Colo.

commentators have endorsed that assignment, at least under some circumstances.[341]

The Nevada Supreme Court has identified the three principal arguments courts routinely offer to justify allocating the insanity defense decision to defendants.[342] "First, the insanity defense is essentially a plea of not guilty by reason of insanity and, as such, it should be entered only by the defendant, or by counsel after the defendant has consented."[343]

That reasoning fails because it rests on a formalistic analysis that misunderstands the essential nature of the decision. Some jurisdictions

---

2000) (stating that, by statute, Colorado authorizes counsel to raise an insanity defense over the defendant's objection where the court finds raising the insanity defense "necessary for a just determination of the charge against the defendant"); State v. Samuel, 838 P.2d 1374, 1381–82 (Haw. 1992) (finding that counsel can withdraw insanity defense without securing waiver from client because it is a "tactical decision"); People v. Anderson, 641 N.E.2d 591, 600 (Ill. App. Ct. 1994); *see also* Alvord v. Wainwright, 469 U.S. 956, 958–61 (1984) (Marshall, J., dissenting) (suggesting that defendant's determined opposition to the insanity defense does not excuse counsel's failure to investigate it); State v. Rambo, 699 P.2d 542, 547 (Kan. Ct. App. 1985) (following Vessels v. Estelle, 376 F. Supp. 1303 (S.D. Tex. 1985), and holding that the right to assert an insanity defense can be waived by the lawyer); Robert D. Miller et al., *Forcing the Insanity Defense on Unwilling Defendants: Best Interests and the Dignity of the Law*, 24 J. PSYCHOL. & L. 487, 487 (1996) (reporting that seventeen American jurisdictions allow presentation of the insanity defense over a defendant's objection). *But see* People v. Gettings, 530 N.E.2d 647, 650–51 (Ill. App. Ct. 1988) (suggesting that the insanity defense decision belongs to the defendant). For a discussion of whether courts have discretion to impose the insanity defense on a defendant, see State v. Fernald, 248 A.2d 754, 760 (Me. 1968) (giving a judge discretion to let a defendant withdraw a guilty plea); State v. Pautz, 217 N.W.2d 190, 192 (Minn. 1974) (holding that court possesses the power to raise the insanity defense *sua sponte*); Note, *The Right and Responsibility of a Court to Impose the Insanity Defense Over the Defendant's Objection*, 65 MINN. L. REV. 927, 931 (1980) [hereinafter Note].

[341] Miller, *supra* note 340, at 500–01 (noting a study which found that a minority of states permitting imposition of mental status defenses over a defendant's objections do so under various competency schemes); Ross, *supra* note 333, at 1385–86, (noting factors that lawyers should consider before substituting their judgment for that of the defendant); Sabelli & Leyton, *supra* note 6, at 233–36 (arguing lawyer should make insanity defense decision and providing a review of insanity case law); Slobogin & Mashburn, *supra* note 77, at 1630 ("A majority of courts hold that the trial court may not impose an insanity defense over the defendant's objection, but a sizeable minority hold that this decision is within the trial judge's (and therefore the attorney's) discretion."); Note, *supra* note 340, at 930–31 & 931 n.21 (citing many state courts that followed the *Whalem* approach).

[342] Johnson v. State, 17 P.3d 1008, 1015 (Nev. 2001).

[343] *Id.*

require notice of the insanity defense to be given in the form of a plea.[344] Some do not.[345] The use of a plea as a vehicle for giving notice of the insanity defense does not change the essential nature of the defense. Nevertheless, the Nevada court's plea analogy would make the question of whether a defendant controls the insanity decision turn on that procedural form. Logic does not justify giving defendants control over the insanity decision in jurisdictions that use the plea as a form of notice, while giving the lawyer control of the insanity decision in jurisdictions that use a non–plea form of notice.[346]

The Nevada court articulated the second reason for committing the decision to defendants:

> An acquittal on the basis of insanity may result in long–term institutionalization, and the consequences of a choice between a possible commitment to a mental health institution or to prison "are so grave and personal that a competent defendant should have the right to make his or her own decision as to whether to interpose that plea."[347]

This reason fares no better. The severity of those consequences tends to show that raising the insanity defense is very often a bad choice because the defendant suffers substantially even if the defense succeeds at trial. The fact that the insanity defense should usually be avoided does not imply anything about whether the lawyer or the defendant should control the decision. Allocating such a presumptively unwise choice to the lawyer at least has the advantage of subjecting the decision to review under the rubric of ineffective assistance of counsel.

The Nevada court's third reason has more force. "[T]he social stigmatization that may attach to an assertion or adjudication of insanity also weighs in favor of leaving the final decision of whether to assert an insanity defense to the competent defendant and not to counsel."[348] In essence, the court claims that a uniquely serious insult to a defendant's

---

[344] *Id.*

[345] *See, e.g.*, People v. Anderson, 641 N.E.2d 591, 600 (Ill. App. Ct. 1994) ("In Illinois . . . insanity is not a plea but is an affirmative defense that is raised by the defendant during trial by the presentation of some evidence in support thereof."); State v. Bean, 762 A.2d 1259, 1266 (Vt. 2000) ("[We] do not require that a criminal defendant enter a special plea of not guilty by reason of insanity.").

[346] *See* White v. State, 299 A.2d 873, 875 (Md. Ct. Spec. App. 1973) (developing this line of argument), *overruled by* Treece v. State, 547 A.2d 1054 (Md. 1988).

[347] *Johnson*, 17 P.3d at 1015.

[348] *Id.*

dignity attaches to the insanity defense, thus justifying the allocation of whether to raise that defense to the defendant.

No one could deny that the insanity defense touches a defendant's dignity. However, the hazard posed to dignity by the insanity defense is not unique, or even especially strong. As the Rivers case shows, defenses other than insanity may also raise significant dignity concerns. Moreover, no greater social stigma attaches to mental illness than to criminal conviction and incarceration, especially where the charged crime is serious and the term of incarceration lengthy. Certainly, as in other circumstances posing painful choices, the decision to advance the insanity defense should be made only after the most careful consideration. A lawyer choosing it must be mindful of the long odds against success, the hazard to the defendant's liberty even in the event of success, and the defendant's personal opposition to the defense.

In *Whalem v. United States*, although both the defendant and his lawyer agreed in their opposition to the insanity defense, [349] the court nonetheless held that a trial court may interpose an insanity defense over the objection of the defense.[350] The *Whalem* court's justification for its decision has been frequently mentioned by other courts in deciding how to allocate the decision.[351] The court began by noting the fundamental meaning of the insanity defense in the criminal law:

> One of the major foundations for the structure of the criminal law is the concept of responsibility, and the law is clear that one whose acts would otherwise be criminal has committed no crime at all if because of incapacity due to age or mental condition he is not responsible for those acts. If he does not know what he is doing or cannot control his conduct or his acts are the product of a mental disease or defect, he is morally blameless and not criminally responsible. The judgment of society and the law in this respect is tested in any given case by an inquiry into the sanity of the accused. In other words, the legal definition of insanity in a criminal case is a codification of the moral judgment of society as respects a man's criminal responsibility; and if a man is insane in the eyes of the law, he is blameless in the eyes of society and is not subject to punishment in the criminal courts.[352]

---

[349] Whalem v. United States, 346 F.2d 812, 814 (D.C. Cir. 1965), *overruled by* United States v. Marble, 940 F.2d 1543, 1547–48 (D.C. Cir. 1991).

[350] *Whalem*, 346 F.2d at 814.

[351] *E.g.*, State v. Fayle, 658 P.2d 218, 228 (Ariz. Ct. App. 1982); State v. Rambo, 699 P.2d 542, 545–46 (Kan. Ct. App. 1985); *Treece*, 547 A.2d at 1061.

[352] *Whalem*, 346 F.2d at 814.

Emphasizing society's judgment that insane persons cannot, in fairness, be punished, the court reasoned that the rules of procedure should not empower the defense to unilaterally defeat society's policy. The court wrote:

> In the courtroom confrontations between the individual and society the trial judge must uphold this structural foundation by refusing to allow the conviction of an obviously mentally irresponsible defendant, and when there is sufficient question as to a defendant's mental responsibility at the time of the crime, that issue must become part of the case. Just as the judge must insist that the corpus delicti be proved before a defendant who has confessed may be convicted, so too must the judge forestall the conviction of one who in the eyes of the law is not mentally responsible for his otherwise criminal acts.[353]

Society's interest deserves a more modest place. This article does not address the question of whether the law should remove the decision from the defense entirely, as *Whalem* does. However, the law *should* assign the decision to counsel, thereby disempowering the defendant from acting against the advice of counsel, to remove the issue from a case.

In assigning the decision to counsel without determining how counsel should decide when to use this desperate defense over a defendant's objections, this article avoids the hardest question. However, the argument that the law should commit the decision to counsel comes easier than the explanation of how a lawyer should decide what to do. The difficult question of what constitutes the appropriate case for overriding a client's objection to the insanity defense deserves its own full exposition elsewhere. However, a clue to the answer arises in Colorado where, by statute and judicial opinion, the law instructs trial judges on how to impose the insanity defense against the will of the defendant.[354] Colorado judges consider "the public's interest in not holding criminally liable a defendant lacking criminal responsibility and the defendant's interest in autonomously controlling the nature of her defense."[355] Colorado explores those interests by considering whether there is a "basic rationality" in the defendant's reasons for opposing the defense, and whether the insanity defense is viable

---

[353] *Id.*; *see also* Lynch v. Overholster, 369 U.S. 705, 732 (1962) (Clark, J., dissenting) (emphasizing duty of judge to seek "a just disposition of every case"), *superseded by statute as stated in* United States v. Mendelsohn, 443 A.2d 1311 (D.C. 1982).

[354] *See* Hendricks v. State, 10 P.3d 1231, 1236 (Colo. 2000) (construing COLO. REV. STAT. § 16-8-103 (2003)).

[355] *Id.* at 1241.

in the particular case.[356] Colorado resolves the matter by a measure that favors the defendant's dignity interest. "[A]n individual's interest in autonomously controlling the nature of her defense, provided that interest is premised on a choice that satisfies the basic rationality test, will predominate over the broader interest of society unless pressing concerns mandate a contrary result."[357] Such factors as these might also properly inform a lawyer's decision, were the law to commit the issue to the lawyer's discretion.

The debate over the assignment of the insanity defense decision is not unique. In allocating the decision of whether to assert other defenses, courts have also failed to reach anything resembling a consensus. A number of courts empower defendants to decide whether to raise other defenses,[358] while other courts assign the decision to lawyers.[359]

3. *Choosing the Claims to Raise on Appeal*

Decisions about the structure of jury deliberation have an appellate analogue in the question of what issues to raise on appeal. In *Jones v. Barnes*, the Supreme Court held that a defendant has no constitutional right to insist that the lawyer raise any particular nonfrivolous issue on appeal.[360] The Court reasoned that allocating the decision to the defendant would "seriously undermine[] the ability of counsel to present the client's case in

---

[356] *Id.* at 1241–44.

[357] *Id.* at 1243.

[358] People v. Frierson, 705 P.2d 396, 403–04 (Cal. 1985) ("[A]lthough the defendant's insistence on the presentation of a defense at the guilt/special circumstance stage may in the final analysis be harmful to his case . . . the right is of such importance that every defendant should have it . . . . ") (brackets and quotations omitted); People v. Morton, 570 N.Y.S.2d 846, 849 (App. Dir. 1991) ("[C]ounsel had no authority to pursue any defense other than the one authorized by defendant."); People v. MacDowell, 508 N.Y.S.2d 870, 872 (Crim. Ct. 1986) ("[T]he decision of whether to forego a legal defense is ultimately for the client and not for the lawyer.").

[359] Meeks v. Bergen, 749 F.2d 322, 327–28 (6th Cir. 1984) (finding that criminal defense counsel may make the strategic decision to assert self–defense rather than battered wife syndrome as a defense at a client's murder trial); Anderson v. Sorrell, 481 A.2d 766 (D.C. 1984); People v. Jones, 811 P.2d 757, 771 (Cal. 1991) (finding that counsel controls choice of defense); State v. Davis, 506 A.2d 86, 89 (Conn. 1986); People v. Ramey, 604 N.E.2d 275, 281 (Ill. 1992).

[360] Jones v. Barnes, 463 U.S. 745, 751 (1983); *cf.* State v. Korth, 650 N.W.2d 528, 536 (S.D. 2002) (requiring lawyer to brief claims desired by client, where lawyer otherwise intends to file *Anders* brief advising court that no meritorious issues exist).

accord with counsel's professional evaluation."[361] Quoting Justice Robert Jackson, the Court remarked that:

> Legal contentions, like the currency, depreciate through over–issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one . . . . [Experience] on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.[362]

The unstated premise of the Court's holding involves a concern for the reliability of appellate outcomes. Justice Jackson's advice posits that an appellate court might overlook a meritorious claim of error if that claim lay in the appellant's brief among a multitude of meritless issues. Thus, an advocate employing a scatter–shot approach might lose an appeal that should have been won and, conversely, a verdict will stand that, under the law, should be reversed.

In his dissent, Justice Brennan argued that the decision whether to raise nonfrivolous claims on appeal belongs to the appellant personally, and that the appellant may act "against the advice of counsel if he chooses."[363] In support of his view, Justice Brennan reasoned that the Sixth Amendment right to counsel protects more than "the State's interest in substantial justice."[364] Respect for the defendant/appellant as an individual requires committing to the defendant/appellant the decision of which issues to raise.[365]

In sum,

> *Faretta* establishes that the right to counsel is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although

---

[361] *Jones*, 463 U.S. at 751.

[362] *Id.* at 752 (quoting Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMPLE L. Q. 115, 119 (1951)).

[363] *Id.* at 758 (Brennan, J., dissenting).

[364] *Id.* (citing Faretta v. California, 422 U.S. 806 (1975)). However, in *Jones* Justice Brennan also doubted the majority's premise that appellate courts would fail to find the meritorious issues presented in a brief raising a multitude of frivolous claims. *Id.* at 762–63.

[365] *See* State v. Boyer, 712 P.2d 1, 4–6 (N.M. Ct. App. 1985) (holding that the decision as to which claims to raise on appeal belongs to the defendant/appellant).

counsel may be better able to decide which tactics will be most effective for the defendant.[366]

E. Decisions Involving the Organization of the Trial

The last category of defense decisions encompasses matters relating to the organization of the trial. Should the defense insist on trial by jury or accept a bench trial? Should the defense seek to recuse the judge? How should the defense exercise its peremptory strikes? Should the defense seek a change of venue? The number of such trial–structuring decisions is almost infinite. However, the discussion need not expand infinitely; the topic can be adequately covered in two sections. The first section addresses the question of whether to demand or waive trial by jury. The second discusses all other trial–structuring decisions collectively. Most courts allocate every trial–structuring decision to lawyers, with a single exception: defendants retain the decision of whether to waive trial by jury.

1. *The Decision of Whether to Demand or Waive Trial by Jury*

Longstanding tradition supports allocating to the defendant the decision of whether to stand trial by jury. In the earliest days of the common law, trial by jury was but one form of adjudication, an alternative to trial by ordeal, by battle, or by compurgation.[367] Long after those alternatives fell into disuse, a defendant technically retained the right to choose them.[368] Courts, however, developed methods of influencing the defendant's choice. In the English common law courts, after the decline of the alternative methods of trial, upon arriving in the courtroom from jail and entering a plea of not guilty,

> [t]he prisoner was asked how he wished to be tried and was instructed in his right of challenge.... These courteous preliminaries established, first, that the prisoner consented to be tried and chose trial by jury. This consent was real, despite the severe consequences to the prisoner of a refusal, for until 1827 a prisoner who would not plead or select trial by God and

---

[366] *Jones*, 463 U.S. at 759.

[367] Singer v. United States, 380 U.S. 24, 27 (1965) ("Compurgation" refers to a trial in which a defendant could present witnesses to testify that he was telling the truth, BLACK'S LAW DICTIONARY 283 (7th ed. 1999)).

[368] *Id.*

country could not be tried.[369]

The consequences of refusing to plead and select a jury trial were indeed serious: "[a]t common law the uncooperative prisoner was induced to plead or select his mode of trial by *peine forte et dure*, and was pressed to death if he remained obstinate."[370]

For many years, American law has specifically allocated to defendants the decision of whether to stand trial by judge or by jury. The Supreme Court has listed the decision as among those belonging to defendants;[371] the authorities on professional ethics concur,[372] as do most courts.[373] A few hold–outs persist, often taking the choice away from defendants only in special circumstances.[374]

The substantial unanimity of the assignment of the decision to the defendant seems to have freed most courts of the obligation to explain or justify that assignment. Perhaps the most elaborate explanation for the allocation is the Sixth Circuit's:

> The purpose of the jury trial is to prevent governmental oppression and arbitrary law enforcement. The jury trial gives the defendant an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. The protection a jury affords lies in the interposition of the commonsense judgment of a group of impartial laymen between the defendant and the potentially biased prosecutor and judge. This protection creates a great societal interest in

---

[369] DAVID J. A. CAIRNS, ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL: 1800–1865 15 (Oxford 1998).

[370] *Id.* at 15 n.35. "Peine forte et dure" refers to the punishment of a felon who refused to plead, whereby accused was crushed until he either pled or died. BLACK'S LAW DICTIONARY 1153 (7th ed. 1999).

[371] Jells v. Ohio, 498 U.S. 1111, 1113 (1991) (Marshall, J., dissenting); *Jones*, 463 U.S. at 751; Brookhart v. Janis, 384 U.S. 1, 6–7 (1966); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942); Patton v. United States, 281 U.S. 276, 298, 312 (1930), *overruled in part by* Morico v. United States, 399 U.S. 78 (1970).

[372] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003).

[373] *E.g.*, United States v. Cochran, 770 F.2d 850, 852 (9th Cir. 1985); United States *ex rel.* Williams v. DeRobertis, 715 F.2d 1174, 1182 (7th Cir. 1983); United States v. Martin, 704 F.2d 267, 271 (6th Cir. 1983); United States v. Woods, 450 F. Supp. 1335, 1337–38 (D. Md. 1978); Townsend v. Superior Court, 543 P.2d 619, 624 (Cal. 1975); People v. Novotny, 244 N.E.2d 182, 186 (Ill. 1968).

[374] *E.g.*, ALA. CODE § 13A-5-42 (2004) (requiring a jury in a capital case, even if the defendant pleads guilty); Elder v. State, 494 So. 2d 922 (Ala. Crim. App. 1986) (construing statute).

> having criminal trials conducted before juries. In fact, the public interest in jury trials is so great that defendants cannot waive their right to trial by jury except under certain conditions.[375]

In short, the decision belongs to defendants simply because the right to a jury is singularly important. Other courts and commentators join in allocating the decision to defendants out of a regard for the importance of the decision, often drawing an analogy to the importance of the pleading decision.[376]

The singular importance of the jury does not, by itself, justify commitment of the decision to the defendant. Based on the premise that juries play an essential role in preventing oppression, one might conclude that juries should not be waivable at all, or waivable only by agreement of defendant and counsel. However, the rule assigning the decision to defendants allows them to waive a jury against the advice of counsel.

On close inspection, the analogy of the jury waiver decision to the pleading decision also fails to support assigning the decision to the defendant. In most instances, the decision to waive a jury trial may substantially increase the chances of conviction because the defendant loses the chance that the jury—a collective decision maker generally is required to be unanimous—might prove unable to agree. There are no hung juries in bench trials. However, many defense decisions that substantially affect the chances of success at trial are not committed to defendants.[377] Certainly, the choice of fact finder is less like the pleading decision than is the decision of whether to offer an instruction and argue for a verdict on a lesser–included offense. An analogy linking the choice of decision maker with other trial–structuring decisions seems truer to the essential nature of such a decision.

2. *Other Trial–Structuring Decisions*

Very broad support exists for committing every other kind of trial–structuring decision to lawyers. For example, courts and other authorities generally allocate to lawyers other jury–related decisions, such

---

[375] *Martin*, 704 F.2d at 271 (citations and quotation marks omitted).

[376] *E.g.*, Virgin Islands v. Weatherwax, 77 F.3d 1425, 1435 (3d Cir. 1996) ("[T]hese decisions are so personal and crucial to the accused's fate that they take on an importance equivalent to that of deciding the objectives of the representation.").

[377] *See infra* Part I.A.2.

as which jurors to strike,[378] whether to raise a claim of jury misconduct,[379] whether to poll the jury on its verdict,[380] or whether to seek a change of venue to get a different jury pool.[381] The majority of courts that assign such decisions to defendants do so simply as an application of a general rule allocating *all* decisions to defendants in the case of a conflict between defendant and lawyer.[382]

Trial–structuring decisions not involving the jury also generally belong to lawyers. For example, courts have held that the following decisions belong to lawyers: whether to move to recuse a judge;[383] whether to insist on a public trial;[384] whether to oppose jury instructions not involving the elements of a lesser offense.[385] Again, those courts that assign such decisions to defendants tend to do so not for any reason relating to the nature of the decision, but rather on the strength of a broader principle assigning decisions generally to defendants.[386]

F. Conclusion of Part II

Part I examined the various theories of allocation and found most of them wanting. Some theories had significant internal contradictions. Other theories avoided internal inconsistency only by using a measure so ambiguous as to offer courts little meaningful guidance. The only allocation theories that avoided those flaws were those that established a presumption in favor of either the lawyer or defendant and justified specific departures from that presumption.

Part II detailed the struggles of courts to find and apply consistent rules of allocation. There are many decisions for which there is no national consensus about proper allocation, and in too many jurisdictions, courts

---

[378] *E.g.*, People v. Colon, 682 N.E.2d 978, 979 (N.Y. 1997); ABA STANDARDS FOR CRIMINAL JUSTICE 4–5.2 (2d ed. 1980).

[379] E.g., *Weatherwax*, 77 F.3d at 1435–36.

[380] State v. Eckert, 553 N.W.2d 539, 545 (Wis. Ct. App. 1996).

[381] *E.g.*, People v. Guzman, 755 P.2d 917, 937 (Cal. 1988); Price v. Superior Court, 25 P.3d 618 (Cal. 2001); State v. Hereford, 592 N.W.2d 247, 252–53 (Wis. Ct. App. 1999).

[382] Cain v. State, 565 So. 2d 875, 876 (Fla. Dist. Ct. App. 1990); State v. McDowell, 407 S.E.2d 200, 209–10 (N.C. 1991); State v. Ali, 407 S.E.2d 183, 189 (N.C. 1991).

[383] *E.g.*, *In re* Horton, 813 P.2d 1335, 1344 (Cal. 1991).

[384] *See, e.g.*, United States *ex rel.* Bruno v. Herold, 408 F.2d 125, 128–29 (2d Cir. 1969).

[385] *E.g.*, State v. Stewart, 780 A.2d 209, 215 (Conn. App. Ct. 2001).

[386] *See, e.g.*, Townsend v. Superior Court, 543 P.2d 619, 624–25 (Cal. 1975) (holding that while the decision whether to waive a statutory speedy trial right belongs to the lawyer, only the defendant can waive the constitutional speedy trial right).

have failed to maintain consistent allocation rules. Part II found also allocation rules that vary, often for no expressly stated reason, depending on whether the question arises in a capital or non–capital case.

This article proposes that courts can best solve their theoretical and practical problems by adopting an allocation theory that makes either the lawyer or defendant the presumptive decision maker, with specified and justified exceptions. Two questions remain: First, which presumption should the law approve? Second, having chosen a presumptive decision maker, which specific decisions should the law assign to the other actor?

In Part III, this article examines and rejects the case for making the defendant the presumptive decision maker. In rejecting that presumption, certain specific decisions are identified which must remain with the defendant, even in a scheme making the lawyer the presumptive decision maker. In Part IV, this article defends a preference for the lawyer as the presumptive decision maker.

III. THE CASE FOR THE DEFENDANT'S AUTHORITY TO DECIDE

As noted above, those who favor presumptive allocation of decisions to defendants principally rely upon three intuitions. The autonomy intuition makes the observation that trial outcome risks center on the defendant, not on the lawyer. The dignity intuition proposes an inconsistency between the allocation of decisions to lawyers and the ideals of a democracy in which "respect for the individual . . . is the lifeblood of the law."[387] The reliability intuition contends that, in a variety of ways, allocation of decisions to lawyers skews, rather than advances, the truth–seeking function of the adversary process.

For the reasons given below, the dignity intuition provides a good reason to allocate certain specific decisions to defendants. The autonomy and reliability intuitions yield no good reasons to do so.

A. The Autonomy Intuition

The autonomy intuition grants the defendant control of defense decisions because the trial will conclude by acquitting or convicting the defendant—not the defendant's lawyer.[388] And, if the trial of serious

[387] Illinois v. Allen, 397 U.S. 337, 351 (1970).

[388] *See, e.g.*, Jacobs v. Commonwealth, 870 S.W.2d 412, 417 (Ky. 1994) ("The Sixth Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. It is not stated in the amendment in so many words the right to make one's own defense personally, but it is implied by the structure of the amendment. It is a foregone

charges should end in conviction, the sentence will take the defendant's life or liberty while the lawyer ordinarily remains at large.

This article rejects the autonomy intuition, but not for any flaw in its factual accuracy. It is dispiriting to a decent defense lawyer when a jury convicts a client, and profoundly worse to hear a jury condemn a client to death. The worst of those consequences, though, is nothing compared to what the defendant endures. Accordingly, if one conceives of the allocation problem as a test of the relative force of the defendant's and the lawyer's interests in the outcome of the trial, the defendant's are great, the lawyer's are slight, and the result is obvious.

To conceive of the allocation problem in those terms, however, is to adopt a view of the stakes of a criminal prosecution so narrowly individualistic as to be almost antisocial. To regard a defendant wrongly convicted or unjustly condemned because of an ill–advised trial decision as the only victim of the error is to forget the heartbroken mother, the orphaned children, and the unsupported spouse. The damage does not stop there. Authors have written powerful accounts of verdicts' rippling effects through communities and across generations.[389] Those more inclined to measurement in economic, than in human, terms also can readily appreciate the enormous costs of criminal justice in a country that incarcerates a greater proportion of its population than any other.[390]

These costs, though heavy, are justified when the verdicts that bring them are right, and they are excused when the verdicts are wrong, as sometimes happens in a system staffed by imperfect people. That guilty defendants, by their crimes, jeopardize their families and communities is an unavoidable fact. Whether not–yet–convicted defendants, by their poor trial decisions, may increase that jeopardy is for the law to accept or prohibit.

The interests of the defendant in the outcome of trial are very great, almost always greater than those of any other person. The interests of the lawyer are slight. However, the interests of lovers, parents, children,

---

conclusion that it is the accused who will suffer the consequences if the defense fails."); Freedman, *supra* note 50, at 202–03 (expressing the idea that control belongs to the defendant because he suffers the consequences of trial).

[389] *E.g.*, FOX BUTTERFIELD, ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE (Avon 1996); MIKAL GILMORE, SHOT IN THE HEART (Doubleday 1994) (relating the family history of murderer Gary Gilmore); STEVE ONEY, And THE DEAD SHALL RISE: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK (Pantheon Books 2003).

[390] The United States, at present, has the highest rate of incarceration ever recorded. King's College London, International Centre for Prison Studies, *World Prison Brief, at* http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest_rates(manual).html (last visited July 17, 2004).

friends, employers, taxpayers, and victims, in the prevention of wrongful imprisonment or unjustly severe punishment, carry weight. Thus measured, the community's collective interest in a just outcome must outweigh the defendant's separate interest in autonomy—in the power to influence the outcome.[391]

B. The Dignity Intuition

The autonomy intuition regards the allocation of trial choices as important because such choices influence trial outcomes, and trial outcomes are important. The dignity intuition regards the allocation of choice as important because a trial can be a valuable forum for the expression of ideas, and principles of liberty cannot abide the involuntary silencing of a defendant at his own trial. The dignity intuition thus differs from the autonomy intuition in that it finds significance in the manner in which the defendant is treated, even when that treatment has no influence on the outcome of the trial. Justice Frankfurter nicely summarized this intuition when he wrote that to require a defendant to accept counsel "is to imprison a man in his privileges and call it the Constitution."[392]

Circumstances other than the allocation of choice may touch the defendant's dignity. Mark Curriden relates a story illustrating a different dignity–based concern about a jury's treatment of a defendant.[393] After the deliberations in a murder trial had continued for some time, a bailiff entered the jury room to make meal arrangements and discovered the jury contentedly playing cards. When called on to explain their behavior, the jurors said that they had early on determined to acquit the defendant, finding him to have acted in self–defense. However, because the jury disapproved of the defendant's conduct—the defendant was charged with killing an enraged husband who found the defendant *in flagrante* with his wife—the jury had decided to make the defendant worry over the verdict for some time before announcing the acquittal. That jury's treatment of the defendant had no influence on the already determined, but undisclosed,

---

[391] *See* Martinez v. Court of Appeal, 528 U.S. 152, 163 (2000) ("The requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court.").

[392] Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942); *see also Martinez*, 528 U.S. at 165 (Scalia, J., concurring) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people.").

[393] Mark Curriden, *Small–Town Justice*, A.B.A. J. July–Dec. 1994, at 64.

outcome of the trial. By stepping outside its role as fact finder to act as a conscious instrument for the defendant's moral correction, the jury's action implicated the defendant's dignity.

The dignity intuition finds support in the fact that our law has, when faced with choices pitting the reliability of the outcomes of criminal trials against other values, sometimes preferred the other values. Indeed, few of us would wish to live in a society which ranked the efficient and accurate management of criminal justice as its highest priority. Some interests matter more than convicting the guilt, and are asserted to limit the devices the government may employ in its pursuit of the culpable.

The Fourth Amendment's exclusionary rule bars use at trial of evidence seized in an illegal search.[394] Courts recognize that application of the rule diminishes the reliability of trial outcomes,[395] but they accept that cost as the price of protecting persons against unreasonable searches by overzealous police. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"[396]

Another exclusionary rule also bars the admission of involuntary confessions, exemplifying the law's preference for certain values above accuracy of outcomes. In part, courts exclude confessions coerced by the police out of concern that such confessions may be false.[397] That concern, however, does not alone support the rule. Courts bar even clearly true, although involuntary, confessions in order to promote the humane and dignified treatment of suspects by police.[398]

Although concerns for dignity motivate the law to prefer it above reliability in those contexts, a critical difference distinguishes those issues from the allocation of choice problem. Both exclusionary rules, although they operate by excluding evidence from a trial, aim to protect the dignity of persons outside the adversary trial. The ban on the use of coerced confessions aims to protect the dignity of suspects against harsh treatment

---

[394] *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961); Weeks v. United States, 232 U.S. 383, 391–93 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[395] *E.g.*, United States v. Leon, 468 U.S. 897, 907 (1984).

[396] Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)); *see also* Louis Michael Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1087–88 (1995) (stating that harm sought to be prevented by the Fourth Amendment involves violation of the dignity inherent in the "violence, disruption, and humiliation" of police search of private places).

[397] *See* Spano v. New York, 360 U.S. 315, 320 (1959).

[398] *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966); *Spano*, 360 U.S. at 320–21; Bram v. United States, 168 U.S. 532, 543–44 (1897).

in interrogation rooms.[399] The Fourth Amendment's exclusionary rule seeks to deter the police from searching homes and seizing persons at random, with or without grounds for suspicion. Though by random and suspicionless searches and by forceful interrogations the police could undoubtedly better discover proof of guilt, the law chooses not to enjoy that benefit. All of us, whether involved in the adversary process or not, would suffer the indignity and insecurity of being perpetually at risk of the invasion of our privacy by the police.

On the other hand, the allocation of defense decisions at an adversary trial does not implicate the interests of everyone at all times. The allocation of decisions threatens only criminal defendants, and then only so long as they remain criminal defendants—i.e., for the duration of adversary proceedings. Moreover, the fundamental purpose of an adversary trial is to ascertain the truth of a charge; adversary trials do not exist to provide a forum for self-expression or to define a sphere of privacy.[400] Therefore, the value of reliability in the adversary process carries greater weight relative to the promotion of dignity or self-expression than it would in a context such as protection of privacy in the home or protection of the freedom to speak on political matters in a political forum.

The advocate of the dignity intuition responds that, even in the adversary trial process, the law has, in some instances, valued the dignity interest above the reliability interest. The Fifth Amendment privilege against compelled self-incrimination operates within the adversary trial to prevent the government from requiring a defendant to testify.[401] A rule requiring a defendant to testify would certainly advance the truth-seeking function of the trial by forcing the defendant from the safe haven of ambiguous silence onto the dangerous reefs of explanation and cross-examination. However, the law has long protected defendants against such compulsion, on the grounds that it offends human dignity to compel defendants to account for themselves in courtrooms.[402] Ultimately, the law understands that a rule forcing an unwilling defendant to speak, while suffering under the fear of criminal conviction, strips away too much dignity.[403]

---

[399] *Miranda*, 384 U.S. at 457–58.

[400] Portuondo v. Agard, 529 U.S. 61, 73 (2000); Estes v. Texas, 381 U.S. 532, 540 (1965).

[401] *See* U.S. CONST. amend. V.

[402] *Miranda*, 384 U.S. at 460.

[403] Certainly, the law is willing to force other witnesses to speak and can abrogate the rule against compelled speech by giving a reluctant witness immunity from prosecution. Murphy v. Waterfront Comm'r of N.Y., 378 U.S. 52, 93–94 (1964) (White, J., concurring).

This article proposes no modification of this law, and fully acknowledges the rightness of the preference for dignity over reliability in that context. Therefore, in that narrow category of decisions that involve the scope of the defendant's personal participation in the trial, I join the consensus committing those decisions to the defendant personally, even over the settled and well–founded opposition of counsel. The defendant may choose to testify over counsel's objection, and may choose not to testify despite counsel's contrary preference. The defendant may choose to be present at trial, even though counsel would waive the defendant's presence. And the defendant may choose not to sit in the courtroom during trial, even though counsel would insist that he appear.

The underlying policy of the Fifth Amendment, however, does not directly affect the allocation of decisions in the other categories: evidentiary decisions, deliberation–structuring decisions, and trial–structuring decisions. Those other decisions, because they do not call upon a represented defendant to personally take any action, do not affect the defendant's dignity in the same direct way as the decisions of whether to testify and whether to appear.

The advocate of the dignity intuition could respond by describing a scenario often advanced to show how other defense decisions put a defendant's dignity at risk. Recall the cases of the African American civil rights activists prosecuted for violations of Jim Crow laws.[404] Charged with trespassing at whites–only lunch counters, the defendants often preferred, when they did not plead guilty, to advance a defense that admitted their commission of the charged acts, but proclaimed that the criminal prosecution itself was unjust. Imagine an appointed defense lawyer, unsympathetic to the defendant's political views. Would not such a lawyer, the dignity intuitionists would say, insist on a defense of insanity? And does it not deeply offend the activist's dignity to endure a defense that denies everything the defendant believes in and has suffered for?[405] The aborted trial of Theodore Kaczynski presents a much discussed,[406] recent instance of that scenario, notwithstanding the very different quality of Kaczynski's political views.

There is a strong argument that the activist's lawyer would, in raising the insanity defense, render ineffective assistance of counsel under any fair interpretation of that doctrine by subjecting a defendant facing minor criminal charges to the hazard of indefinite confinement in a prison

---

[404] *Cf.* Sabelli & Leyton, *supra* note 6, at 194–95 (discussing a criminal defendant's dignity in the context of Theodore Kaczynski's struggle with his counsel over whether to argue mental illness as a defense).

[405] *See, e.g.*, Treece v. State, 547 A.2d 1054, 1060 (Md. 1988).

[406] *See supra* note 39 (citing article about the Kaczynski trial).

psychiatric hospital. However, taking the scenario on its face, one discovers two considerations that satisfactorily answer the challenge it poses.

First, the activist, like all other competent defendants under the formulation of the rules here proposed, retains the power to testify against the advice of counsel. By controlling that decision, the activist may proclaim the injustice of the prosecution and denounce the lawyer's preferred defense. Second, the law generally discourages the use of criminal trials for overtly political ends, and for good reason. Courts do not allow defendants to get a jury instruction on the justification defense when the basis for the defense is that the defendant acted out of a belief in the injustice of the law.[407] Courts also do not allow defendants to get a jury instruction advising the jury of its power to nullify a criminal law by acquitting because courts do not acknowledge the legitimacy of that ground for acquittal.[408] In a mature democracy, the wisdom and justice of criminal laws should be debated and decided in proper political arenas, i.e., in legislatures and in election campaigns. Juries should apply the laws and try defendants; they should not try the laws.

As recently as the decision in *Sell v. United States*,[409] the Supreme Court reaffirmed the principle that promoting the reliability of the adversary process sometimes outweighs a defendant's interest in dignity. In *Sell*, the Court held that prosecuting authorities may, upon a sufficient showing, medicate an unconsenting defendant in order to make him competent to stand trial.[410] Thus, where the decision involves direct, personal action by the defendant, the interest in dignity requires that defendants retain final control of the decision. However, where the decision requires no direct action by the defendant, jeopardy to the defendant's dignity decreases and the countervailing interest in reliable outcomes justifies final assignment of the decision to counsel.[411]

Those who favor assigning decisions to defendants often accuse their opponents of paternalism and arrogance for presuming that the lawyer, rather than the client, knows the course that best serves the defendant's interests. I understand the dilemma differently. Criminal trials, unlike civil lawsuits, explicitly name the community as a party to the suit, and the

---

[407] *E.g.*, United States v. Schoon, 971 F.2d 193, 195–96, 199–200 (9th Cir. 1991); United States v. Cullen, 454 F.2d 386, 391 & n.12, 392 (7th Cir. 1971); Matthew Lippman, *Reflections on Non–Violent Resistance and the Necessity Defense*, 11 HOUS. J. INT'L L. 277, 278, 294–305 (1989).

[408] *See, e.g.*, State v. Ragland, 519 A.2d 1361, 1367 (N.J. 1986).

[409] Sell v. United States, 539 U.S. 166, 179–83 (2003).

[410] *Id.* at 168.

[411] *See* U.S. CONST. amend. V.

verdicts in criminal trials purport to speak for us all.[412] Therefore, in allocating the power to decide, the law must choose whether and when to sacrifice society's interest in the justice of verdicts to protect the dignity of an individual defendant.

If we lived in a society in which the principal consequences of a criminal conviction were shame and loss of dignity, then the law should rarely allocate decisions away from defendants. In that society, the lawyer imposing an unwelcome defense would be taking from the defendant, before conviction, the very thing the prosecution seeks to take by the conviction.

We do not live in that society. In our prisons, convicted defendants too often suffer deprivations and indignities far more brutal and enduring than the loss of control over trial decisions.[413] The defense lawyer's fundamental responsibility is to reduce, as far as possible, the client's exposure to those deprivations and indignities. Society's compelling interest in inflicting them only when, and only to the extent, absolutely necessary requires that the law assign control over decisions to lawyers, as the persons best qualified to know the course most likely to minimize exposure to punishment. To assign such decisions to defendants undermines society's interest in reliable judgments, and would, in the name of defending their dignity, more frequently consign defendants to a program of punishment that extinguishes their dignity.

C. The Reliability Intuition

The reliability intuition proceeds from a very different premise. The autonomy and dignity intuitions place the defendant at the center of the argument for allocating decisions to defendants. However, the reliability

---

[412] Sabelli & Leyton, *supra* note 6, at 206:

> The fairness of the criminal process . . . also has societal value—a value beyond the interest of an individual criminal defendant. All persons associated with the criminal justice process, directly or indirectly, share an interest in the fairness of the process. All of us suffer harm if the criminal process is unjust; we may fear that similar injustice will be visited upon us directly or we may be offended knowing that we support . . . a process that fails to treat human beings in a just manner. The criminal justice system speaks in our name and, therefore, each of us is implicated when that voice offends shared notions of 'decency and fairness.'

Id. (citations omitted).

[413] David Grann, *The Brand: How the Aryan Brotherhood Became the Most Murderous Prison Gang in America*, NEW YORKER, Feb. 16 & 23, 2004, at 157–71; Will S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, HARPER'S, Aug. 2003, at 43–54.

intuition starts where advocates for assigning decisions to lawyers start—by focusing on society's interest in reliable outcomes. The reliability intuition disagrees with the assertion that, at least for some decisions, assigning decisions to lawyers better serves society's interest.

The suspicion that defense lawyers distort the truth–seeking function has venerable precedents. English courts did not allow defense lawyers at all in felony trials until Parliament passed the Treason Trials Act of 1696.[414] For the next thirty–five years, English courts limited counsel to treason trials. However, by the 1730's courts had begun to permit counsel in the trial of other felonies.[415] Treatises explicitly justified the rule against counsel by reference to the goal of promoting reliable trial results. In a 1724 treatise, William Hawkins wrote:

> generally every one of common understanding may as properly speak to a matter of fact as if he were the best lawyer, and . . . it requires no manner of skill to make a plain and honest defence, which in cases of this kind is always the best; the simplicity, the innocence, the artless and ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own . . . . Whereas, on the other side, the very speech, gesture, and countenance and manners of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them.[416]

When discussing the problem of allocating choice in a system that permits defense lawyers, modern scholars have asserted a variety of distortion mechanisms that follow from the assignment of decisions to counsel. In his dissent in *Jones v. Barnes*,[417] Justice Brennan stated one version of the argument that commission of decisions to the defendant actually advances the truth–seeking function of the trial. In that opinion, he wrote:

> A lawyer and his client do not always have the same interests. Even with paying clients, a lawyer may have a strong interest in having judges and prosecutors think well of him, and, if he is working for a flat fee—a common arrangement for criminal defense attorneys—or if his fees for court appointments are lower than he would receive for other work, he has

---

[414] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 67–68 (Oxford Univ. Press 2003).

[415] *Id.* at 106.

[416] CAIRNS, *supra* note 369, at 77–78.

[417] Jones v. Barnes, 463 U.S. 745 (1983).

> an obvious financial incentive to conclude cases on his criminal docket swiftly. Good lawyers undoubtedly recognize these temptations and resist them. . . . It would be naive, however, to suggest that they always succeed . . . .[418]

In short, Brennan spoke in favor of assigning decisions to defendants on the ground that lawyers, left to their own devices, would too often allow self–interest to color their judgment about the best course of defense.

False friends and those who, with the lives of others in their trust, neglect their duties undeniably deserve to be regarded with contempt. Brennan's concern that a number of American criminal defense lawyers disgrace themselves in such a way regrettably has some basis in fact.[419] However, reassigning decisions to defendants is ineffective no remedy for the distortion of the truth–seeking function caused by lawyers' assistance. First, the reassignment of decisions would take decisional control from both effective *and* ineffective lawyers. Thus, the well–tailored solution to the negligent counsel problem is vigorous enforcement of the standards of effective assistance. Second, allocating decisions to lawyers, even knowing that some lawyers will render ineffective assistance, still leaves the law with a corrective measure through the ineffective assistance claim. There is no recognized claim of ineffective self representation. Accordingly, the law has no means to correct distortions of the truth–seeking function caused by the poor decisions of clients, but it does retain a doctrine allowing the correction of such distortions caused by lawyers' poor decisions.

A second version of the reliability argument proposes that decisions should ultimately belong to defendants because they best know the facts of the case.[420] Richard Uviller, for example, "would expand somewhat on the conventional allocation to assign to the accused full power, upon advice of counsel, to elect the theory of defense, [because] the decision hinges on facts that the accused is in the best position to know."[421]

Ultimately, this argument proposes an empirical premise about real defendants and real defense lawyers that lies beyond the scope of this article. I assume that lawyers generally make better decisions than defendants about minimizing the risk of exposure to serious sentencing consequences. Certainly, lawyers also have the obligation to investigate the

---

[418] *Id.* at 761–62 (Brennan, J., dissenting).

[419] The law reports are filled with cases discussing claims of ineffective assistance of counsel, many of which courts have found meritorious.

[420] Uviller, *supra* note 21, at 779 (allocating the decision about the theory of defense to the defendant because he best knows the facts and the ultimate decision hinges on such facts).

[421] *Id.*

facts known by the client and, in complex cases, many facts beyond the client's knowledge or understanding.

A broad consensus about this point supports the assumption. For example, Justice Stevens, in *Martinez v. Court of Appeal*,[422] wrote:

> In both trials and appeals there are, without question, cases in which counsel's performance is ineffective. Even in those cases, however, it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself. No one . . . attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient."[423]

A third version of the reliability intuition proposes that the allocation of decisions matters to the truth–seeking function of trial to a lesser extent than might be supposed. It can be conceded that lawyers generally exercise better judgment than defendants with respect to all types of defense decisions, without conceding that the difference substantially affects the reliability of trial outcomes. The deficiencies in decisions made by a client–controlled defense are, on this view, very often corrected by other actors in the adversary system, such as prosecutors and judges who owe their final allegiance to impartial justice. For example, advocates of this view could point to the conduct of Judge Zobel in *Commonwealth v. Woodward*.[424] In that briefly famous case, a British nanny was prosecuted in Massachusetts for the murder of the child in her care.[425] In her defense, she denied causing the injuries that killed the child.[426] After consultation with Woodward, her lawyers announced that they wanted no manslaughter instruction, preferring instead to put the jury to the all–or–nothing choice of convicting Woodward of murder or acquitting her.[427] The jury chose conviction.[428]

If client and counsel had disagreed about the matter, Judge Zobel would have faced the question of allocating the power to decide. In the end, Judge Zobel entered an order vacating the murder conviction and entering a conviction for manslaughter.[429] By correcting what he perceived to be an

---

[422] Martinez v. Court of Appeal, 528 U.S. 152 (2000).

[423] *Id.* at 161; *see also* Decker, *supra* note 12, at 518–19.

[424] Commonwealth v. Woodward, 694 N.E.2d 1277 (Mass. 1998); *see also* Uphoff, *supra* note 8, at 1–2.

[425] *Woodward*, 694 N.E.2d at 1281.

[426] *Id.* at 1281 n.4.

[427] *Id.* at 1281.

[428] *Id.*

[429] *Id.*

injustice caused by an unwise defense decision, Judge Zobel gave support to the hypothesis that allocation of defense decisions does not matter much in a system in which other actors can correct the wrong outcomes produced by bad choices.

Justice Brennan championed a modest form of this argument in *Jones v. Barnes*.[430] Concerning the question of appellate issue selection, he wrote:

> While excellent presentation of issues, especially at the briefing stage, certainly serves the client's best interests, I do not share the Court's implicit pessimism about appellate judges' ability to recognize a meritorious argument, even if it is made less elegantly or in fewer pages than the lawyer would have liked, and even if less meritorious arguments accompany it. If the quality of justice in this country really depended on nice gradations in lawyers' rhetorical skills, we could no longer call it "justice." Especially at the appellate level, I believe that for the most part good claims will be vindicated and bad claims rejected, with truly skillful advocacy making a difference only in a handful of cases.[431]

Again, the flaw in the argument lies in an empirical premise that this article cannot here prove. Specifically, judges very rarely act as Judge Zobel did. In some jurisdictions, judges lack the power to set aside criminal convictions on the ground that they are against the weight of the evidence.[432] Certainly, commentators have noted the extraordinary rarity of judicial orders of the Zobel type.[433] This article also assumes that the quality of defense decision making influences ultimate trial and appellate outcomes. Empirical research indicates that defendants get much better outcomes with legal representation than without.[434] Finally, a substantial consensus exists among trial judges that outcomes do vary according to the quality of

---

[430] Jones v. Barnes, 463 U.S. 745 (1983).

[431] *Id.* at 762 (Brennan, J., dissenting).

[432] *E.g.*, People v. Prato, 700 N.Y.S.2d 365, 366 (Dist. Ct. 1999) (holding that the trial court does not have the authority to set aside a verdict as against the weight of the evidence), *aff'd*, 719 N.Y.S.2d 799 (App. Term 2000); People v. Mulqueen, 589 N.Y.S.2d 246, 247–48 (Dist. Ct. 1992) ("trial court is not authorized to set aside a verdict as against the weight of the evidence").

[433] *E.g.*, Uphoff, *supra* note 8, at 2–3.

[434] *See, e.g.*, Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1783 (2002) (reporting the results of an empirical study which found that represented defendants get much more favorable bail conditions than do unrepresented defendants).

defense decisions.[435]

However, one category of defense decision does not affect the reliability of outcomes and may be assigned to defendants without risking wrong results. This category includes decisions of whether to invoke the adversary process: how to plead, and whether to appeal. By pleading not guilty and insisting on a trial, a defendant invokes the full panoply of adversarial rights. Thus, the decision to stand trial, even if ill–advised, does not itself undermine the reliability of the adversary process. Much more rarely, a defendant may insist on pleading guilty against the advice of counsel. The law imposes on trial courts the obligation to prevent involuntary guilty pleas and to assure that a factual basis exists, independent of the defendnat's mere desire to plead guilty, to support the conclusion that the defendant is in fact guilty.[436]

The same considerations apply to the appellate analogue. No defendant, simply by appealing and invoking the adversary appellate process, can be said to undermine the reliability of the outcome of that process. Therefore, those threshold, process–invoking decisions can be assigned to defendants at no cost in terms of the reliability of the outcomes of those processes.

One might object that this article has passed too quickly over the situation of a defendant who turns down a favorable plea bargain in order to stand trial in a case involving overwhelming evidence of guilt. That unwise pleading decision may, with some accuracy, be described as the cause of an enhanced sentence. In what respect, one might ask, does this unwise pleading decision differ from other unwise decisions—about the nature of the defense, for example—which produce increased sentences? The results of those other decisions may be considered unreliable, and the use of that label justifies assigning the decisions to counsel.

The answer lies in a difference concealed by the use of the identical word "produces" in the two scenarios. Recall the Rivers case in which the defendant decided to advance an absolute innocence defense when proof of his participation in the killing was overwhelming. Rivers had a plausible mental state defense, admitting participation in the homicidal acts but reducing the level of culpability from murder to manslaughter. That bad decision skews the adversary process in favor of the prosecution. The prosecution's case for guilt of murder is met with a frivolous other–perpetrator defense instead of by a substantial mental–state defense. Rivers's decision, through the malfunctioning of the adversary process, produced an increased likelihood of conviction and enhanced punishment.

---

[435] *E.g.*, Martinez v. Court of Appeal, 528 U.S. 152, 161 (2000); Faretta v. California, 422 U.S. 806, 834 (1975).

[436] Boykin v. Alabama, 395 U.S. 238, 242–44 (1969).

On the other hand, a decision to insist on a trial with no promising defense does not skew the adversary process in favor of the prosecution. The underlying merits of the case already substantially favor the prosecution, and the defendant's decision to reject the favorable plea bargain does not strengthen the state's case or weaken the defense case.

A fourth reliability argument redefines the measure of trial outcomes. The previously described reliability arguments accept the premise that outcomes are judged by their objective effects: acquittal is better, from the defense perspective, than conviction; conviction of a lesser offense is better than conviction of a greater; a lighter punishment is better than a harsher one. This line of argument rejects that premise, finding that the best defense is to be measured by whatever criteria the defendant prefers. Viewed in that light, lawyers' and defendants' judgments about the measure of success are essentially subjective. Each actor's preferred criterion of success is informed by that actor's education, experience, and background. Therefore, no lawyer can presume to know what best serves the client's interest, at least when the client disputes the lawyer's account of the client's interests.[437]

For example, consider the defendant who cares more about protecting a third person—perhaps a fragile witness, loved by the defendant, who possesses exculpatory information but may not be able to survive the rigors of testifying—than about avoiding criminal conviction. Rodney Uphoff describes a case of this sort in which the defendant, after a first trial ended in mistrial, demanded that his lawyer not call the defendant's father to testify again at the retrial.[438] The defendant feared his father's health was too frail to survive the stress of testifying again, and fully understood the risks of proceeding to trial without his father's supporting testimony.[439] Should the decision whether to call the father to testify belong to the lawyer or to the defendant? Uphoff describes the levels of investigation that a competent lawyer should undertake before he concedes that the choice is in fact as stark as it initially appears.[440] Uphoff further details other facts that might influence the decision-making process. How serious are the charges facing the defendant? Would the witness come to trial willingly, or reluctantly, harboring hostility that might undercut the exculpatory value of the witness's testimony?[441] Though the case is indeed a troubling one, it

---

[437] Marcy Strauss, *Toward a Revised Model of Attorney–Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 326–29 (1987). For an account of a lawyer who has faced such a dilemma, see Ross, *supra* note 333, at 1346, 1371.

[438] Uphoff, *supra* note 8, at 763.

[439] *Id.*

[440] *Id.* at 800–02.

[441] *Id.*

does not justify reassigning the decision about which witnesses to call to the defendant.

The scenario does raise two questions, each warranting separate analysis. First, should the defendant or the lawyer have the power to decide whether to call the witness? Second, if the lawyer retains the power, what constraints should guide the lawyer's decision? As discussed below, the rule assigning the decision of which witnesses to call should continue to be the lawyer's, regardless of the reasons for calling or not calling a witness. Furthermore, the lawyer in the hypothetical should, if the facts are as the defendant describes them, usually not call the witness.

The canons of ethics not only govern the control of decisions, but also guide lawyers when making the decisions that are theirs to make.[442] Endorsement of a rule assigning decisions to lawyers does not necessarily imply that lawyers must take a narrow view of what minimizes damage to the defendant. For example, the lawyer should not choose an insanity defense over some other defense to a minor charge merely because, in some dry, textbook sense, acquittal by reason of insanity is a better result than conviction. Acquittal by reason of insanity often exposes a defendant to the risk of indefinite confinement in a facility that amounts to a prison, in all but name. It would be an odd and unjustifiably narrow interpretation of the goal of minimizing damage to regard such a result as better than a conviction. Therefore, with a possible exception where a witness, such as the father, is critical to the defense in a prosecution alleging very serious charges, the lawyer should not call the father to testify.

The fact that a lawyer should broadly interpret the imperative of minimizing damage to the client does not require reassignment of that decision to the defendant. Reassigning the decision to the defendant would mean that the father does not testify as a witness, even if the defendant's beliefs about the risks to his father's health are unreasonable. By assigning decisions to lawyers, the law does not license them to exercise that power without consultation, without deference to a client's values, and without sensitivity to the complexities of human crises. By assigning decisions to lawyers, the law strikes a better balance between the interests of dignity and autonomy, on the one hand, and on the other hand the broader social interest in inflicting the sanctions of criminal justice only when absolutely necessary.

The assertion that the establishment of defense goals is inherently subjective has even less force in the more general run of cases, in which the

---

[442] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) cmt. 2 (2003) (indicating that lawyers should ordinarily defer to a client's preferences when the defendant's goal is protection of a third person).

defendant has no interest at stake anywhere near as important as the interest in winning the case. Certainly, elsewhere the law regards strategic defense decisions as objectively reviewable. In the context of ineffective assistance of counsel claims, the Supreme Court requires a defendant to show that "counsel's representation fell below an objective standard of reasonableness."[443]

A fifth challenge to the proposal that defense decisions be allocated to defendants points out that the rule assigning more decisions to lawyers may, as a practical matter, prove enforceable only in the case of indigent defendants. Defendants wealthy enough to retain counsel can, by contract with their lawyers, retain final authority over defense decisions.[444] While this observation is true, several considerations substantially undermine the force of this objection. In a variety of ways, wealth matters in expanding the choices available to defendants. For example, indigent defendants must make a showing of need before they can require a court to provide funds for expert or investigative assistance.[445] Wealthy defendants, of course, can hire whatever experts they choose without proving their necessity.

The law, however, tries to resist establishing distinctions between the wealthy and the poor which would affect the justice defendants receive. Thus, rich and poor defendants alike can raise a claim of ineffective assistance if their lawyers' decisions are prejudicially deficient. By contracting for control of decisions that otherwise lawyers would make, wealthy defendants may put themselves in a worse position than indigent defendants. The lawyers of indigent defendants remain responsible for a full range of attorney decisions, and cannot escape review of poor decisions under the rubric of ineffective assistance. Wealthy defendants, by purchasing the right to make more decisions against the advice of counsel, both weaken the quality of their defense and risk losing the right to bring any ineffective assistance claims with respect to these decisions.

Finally, a few authorities have advanced a sixth reliability argument. The argument proposes that insofar as the decision whether to testify belongs to the defendant, other decisions must also follow that assignment for fear that "[c]ounsel and client at cross purposes on the essential theory of defense will turn a trial into a farce."[446] That possibility, however real it

---

[443] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[444] I am grateful to Professor Carol Steiker of Harvard Law School for calling this argument to my attention.

[445] *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

[446] Uviller, *supra* note 21, at 754; *see also* McKaskle v. Wiggins, 465 U.S. 168, 177 (1984) ("The right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others.").

may be, does not automatically lead to the conclusion that most other decisions must be reassigned to the defendant to avoid a defense speaking with two voices. Because of the importance of speaking with one voice, the atmosphere of pervasive uncertainty surrounding many defense decisions, and the extraordinary value to the defense of a good attorney–client relationship, lawyers sometimes make decisions they would not otherwise make but for the defendant's preference. Thus, if the defendant's preferred defense is even modestly plausible, or not substantially more implausible than the lawyer's preferred defense, the lawyer should accept the defendant's choice. That choice represents the effective lawyer's best alternative under the constraining circumstances of a stubborn defendant possessed of the absolute power to testify. The spectacle of the farcical two–tongued defense should rarely appear in lieu of a defendant's plausible preferred defense. Rather, an effective lawyer should only speak in competition with the defendant when the defendant's preference is entirely absurd and the lawyer, by introducing a competing plausible defense, offers the only hope of success.

IV. THE CASE FOR THE LAWYER'S AUTHORITY TO DECIDE

Theories favoring the lawyer as the decision maker for the defense justify that presumption with one theoretical and one empirical premise. The theoretical premise proposes that the motivating purpose of an adversarial criminal trial is the discovery of truth. The empirical premise proposes that lawyers, in general, recognize the best course of defense better than defendants. The discussion of this theory begins with a few words about each of these premises.

The Supreme Court has declared that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."[447] Often, the Court has justified rulings by reference to the truth–seeking function of trial.[448] Other purposes of trial exist, such as the

[447] Neder v. United States, 527 U.S. 1, 18 (1999) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)); *see also* United States v. Scheffer, 523 U.S. 303, 309 (1998); United States v. Robinson, 485 U.S. 25, 33 (1988); Colorado v. Connelly, 479 U.S. 157, 166 (1986); United States v. Bagley, 473 U.S. 667, 692 (1985) ("[T]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one.").

[448] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 360 (1977) (plurality opinion) ("Our belief that debate between adversaries is often essential to the truth–seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."); Estes v. Texas, 381 U.S. 532, 558 (1965) (tracing the history of trial by jury and noting a growing understanding

instruction of the public in civic virtues, but the Court has never given primacy to them.[449] Indeed, the Court has declared that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[450]

The empirical premise finds equally strong support in the decisions of the Supreme Court. The *Faretta* majority, even as it recognized a constitutional right of self representation, conceded that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."[451] In so writing, the *Faretta* court recalled Justice Sutherland's powerful statement for the Court in *Powell v. Alabama*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[452]

On a number of occasions, the Supreme Court has reconfirmed that "the help of a lawyer is essential to assure the defendant a fair trial."[453]

These two premises, in combination, favor allocation of decisions to lawyers. Our system of adjudication entrusts the discovery of truth to a

---

of truth–seeking purpose of trial).

[449] *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 63 (1988) (positing that "criminal defense is an exceptional part of the legal system, one that aims at the people's protection from the state rather than at accurate outcomes"); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 68 WASH. U. L.Q. 1, 13 (1990).

[450] Martinez v. Court of Appeal, 528 U.S. 152, 162–63 (2000) (noting the "overriding state interest in the fair and efficient administration of justice").

[451] Faretta v. California, 422 U.S. 806, 834 (1975).

[452] *Id.* at 833 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

[453] *Id.* at 832–33; *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (describing lawyers as "necessities, not luxuries").

process managed by partisan adversaries.[454] That being so, any rule that causes imbalance in the adversary battle undermines the search for truth. Insofar as lawyers tend to know the best course of defense better than defendants, a rule that permits defendants to overrule their lawyers' judgment undermines the strength of the defense and leaves the strength of the prosecution untouched.

Judge Reinhardt, concurring in *United States v. Farhad*,[455] connects these two premises with the constitutional analysis that vindicates the allocation of decisions to counsel. He eloquently reconciles the Sixth Amendment's right to counsel with the Fifth Amendment's promise of due process and a fair trial:

> The right to a fair trial is the most fundamental of all freedoms, essential to the preservation and enjoyment of all other rights. Moreover, the right is not solely individual in nature; it is an essential part of the architecture of American constitutional democracy—more than an instrument of justice and more than one wheel of the Constitution. It is the lamp that shows that freedom lives. The guarantee of a fair trial lies at the base of all our civil and political institutions.[456]

Turning next to the Sixth Amendment, Judge Reinhardt described its role differently; it is instrumental whereas the Fifth Amendment is essential:

> Unlike the right to a fair trial, the right to self representation is not absolute. The primary purpose of the Sixth Amendment's specific procedural guarantees is to ensure that convictions are obtained in fair trials. In other words, the Sixth Amendment rights are intended to implement the Fifth Amendment due process guarantees. While those rights are unquestionably important in themselves, elevating a Sixth Amendment procedural right over the fundamental right to a fair trial, as *Faretta* implicitly does, impermissibly elevates form over substance.[457]

A few points about the justification for the lawyer preference warrant special notice. First, in *Faretta* the Court accepted the empirical premise only as a general rule.[458] That is, the Court did not subscribe to the view that

---

[454] For an argument that an inquisitorial, rather than an adversarial, process best discloses the truth, see LANGBEIN, *supra* note 414, at 331–43.

[455] United States v. Farhad, 190 F.3d 1097 (9th Cir. 1999).

[456] *Id.* at 1105 (citations and quotation marks omitted).

[457] *Id.* (citations and quotation marks omitted).

[458] *Faretta*, 422 U.S. at 834 ("It is undeniable that in *most* criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts.") (emphasis added).

lawyers *always* exercise better judgment than defendants. Indeed, it would say something extraordinary about both the criminal defense bar and the population of criminal defendants if it were true that lawyers always know better than defendants what course of defense to follow. Thus, if sometimes defendants have better instincts than lawyers, should not the rule assigning decisions to lawyers be qualified in some way to allow for the exceptional case?

The problem with a rule sufficiently nuanced to allow defendants to make decisions when defendants know better than their lawyers, is that such a rule requires an arbitrator to resolve, in any particular case, whether the lawyer's or the defendant's judgment is superior. In other words, a nuanced rule would place a trial judge in the position of having to decide whether it better serves the defense to follow the lawyer's course or the defendant's course. In effect, the nuanced rule would give to a judge the power to decide about the best defense, notwithstanding that the judge has less exposure than either the lawyer or defendant to the tactical and investigative background motivating the lawyer–client dispute.

The problem of allocation of decision, therefore, requires a general rule that does not vary according to the merits of the particular decision in dispute. That being the case, the allocation of decisions to lawyers has the advantage of committing the decision to the discretion of the actor who, most of the time, exercises better judgment. The lawyer preference has the further advantage of allowing for judicial review of ill–advised lawyer decisions. No doctrine exists allowing for judicial review of ill–advised defendant decisions.

Second, some authorities have noted other reasons for allocating decisions to lawyers. For example, considerations of trial efficiency support this allocation because many trial decisions must be made quickly,[459] and mandatory consultation between lawyer and defendant would significantly slow trials. This article does not rely on such arguments. Instead, the lawyer preference proposed here rests on the truth–enhancing tendencies of that allocation.

Third, to accept discovery of the truth as the central purpose of the criminal trial is to accept the existence of a truth that exists independently of the trial. Outside the more solipsistic reaches of speculative philosophy, little doubt exists that there is a "truth" that trials, in some meaningful sense, can hope to discover. Did the defendant, or some other person, inflict the fatal blows upon a murder victim? Did the defendant act under provocation sufficient to reduce a homicide from murder to manslaughter?

---

[459] *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 760 (1983) (Brennan, J., dissenting) (referring to "hundreds of decisions that must be made quickly in the course of a trial").

The placement of the burden of proof on the prosecution allocates the risk of error away from the defendant, but does not limit the truth–seeking object of a criminal trial.

An example may help illustrate the reliability argument for the allocation of decisions to lawyers. In capital murder prosecutions, it sometimes happens that defendants decide that they do not wish to present mitigating evidence to the jury.[460] Such defendants often act out of a sense of shame about the substance of the mitigating evidence, or out of a desire to protect other persons from the experience of testifying.[461] Other defendants refuse to present mitigating evidence because they prefer a sentence of death to that of perpetual imprisonment.[462] In any case, the effect of allowing such a defendant to make that decision is the same: the defense presents nothing, or less than all it could present, in mitigation of the sentence.

That defendant's subversion of the defense case in the penalty phase raises a significant constitutional concern.[463] The United States Supreme Court's modern jurisprudence of capital punishment has discovered two fundamental principles in the Eighth Amendment's cruel and unusual punishment clause. First, state law must establish principles to guide the discretion of capital sentencers to achieve consistency in the selection from among all murderers, those few sentenced to death.[464] Most state legislatures accomplish this task by enacting statutory aggravating circumstances, which in theory identify from among all murders those singularly aggravated murders for which a death sentence is potentially a fit punishment.[465] Speaking in a time before the widespread use of statutory aggravating factors, Justice Stewart, in his concurring opinion in *Furman v. Georgia*, famously described the selection of those few murderers punished by death as being as random and infrequent as a lightning strike.[466]

---

[460] *See supra* notes 225–26.

[461] *See* Larette v. State, 703 S.W.2d 37, 39 (Mo. Ct. App. 1985) (stating that defendant did not want his father to testify out of concern for the father's health); Sabelli & Leyton, *supra* note 6, at 193 & n.93 (citing Knight v. Dugger, 863 F.2d 705, 749–50 (11th Cir. 1988) and stating that defendant did not want the mother to testify about the father's sexual abuse of siblings); Uphoff, *supra* note 8, at 763–65 (discussing, in a non–capital setting, a case in which the defendant wished not to call his father to testify).

[462] Sabelli & Leyton, *supra* note 6, at 193; White, *supra* note 205, at 855.

[463] Sabelli & Leyton, *supra* note 6, at 203–07.

[464] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 195 (1976).

[465] *See, e.g.*, FLA. STAT. ANN. § 921.141(5)–(6) (West 2001); GA. CODE. ANN. § 17-10-30(b) (2004); N.H. REV. STAT. ANN. § 630: 5, pts. VI, VII (1996); OKLA. STAT. ANN. tit. 21, § 701.12 (West 2002).

[466] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

Some states responded to the Supreme Court's concern about the arbitrariness of capital punishment by enacting mandatory death penalty statutes under which all persons convicted of murder suffer death. In *Woodson v. North Carolina*, the Supreme Court invalidated those statutes, and in so doing emphasized the second fundamental Eighth Amendment principle.[467] This principle holds that the constitutionality of capital punishment schemes does not depend solely upon the degree to which they banish arbitrariness; rather, a constitutional scheme requires that the sentencer retain some authority to tailor the punishment to the individual circumstances of the case.[468] In practice, this principle of individualization has found its most important expression in the rules of *Lockett v. Ohio*[469] and *Eddings v. Oklahoma*.[470] In those decisions, the Supreme Court held that the sentencer may not be precluded by law from considering all the circumstances of the offense and the offender in deciding whether to impose a death sentence.[471]

In sum, the constitutionality of the death penalty depends first on the use of statutory guidelines which identify of the most highly aggravated murder cases and restricts the use of the penalty to cases in that class. Second, constitutionality depends on the sentencer's ability to select from among those death-eligible cases, based on an evaluation of the individual circumstances of the offense and the offender, the few in which the penalty should be imposed. By these principles, the problems afflicting the pre–1972 capital punishment regime were resolved by positing the existence of a narrow class of cases in which the offender deserved death, and by developing a scheme of aggravating and mitigating circumstances designed reliably to identify those cases from among all other murder cases.

Such a scheme, which seeks a correspondence between courtroom result and objective justice, confronts a devastating problem when one of the parties fails to perform its assigned function. When the defense fails to present important mitigating factors, so that only aggravating factors are before the sentencer, an offender who would otherwise have been punished by a sentence of imprisonment will instead be sentenced to death. Consider the case of Daniel Colwell.[472]

Daniel Colwell was an African American raised in Americus,

---

[467] Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

[468] *Id.*

[469] Lockett v. Ohio, 438 U.S. 586 (1978).

[470] Eddings v. Oklahoma, 455 U.S. 104 (1982).

[471] *Id.* at 113–15; *Lockett*, 438 U.S. at 608.

[472] Colwell v. State, 544 S.E.2d 120, 123–24 (Ga. 2001).

Georgia.[473] He grew up in a religious family and became, through outstanding athletic ability, a widely popular high school football star.[474] Those talents earned him a football scholarship to the University of Tennessee.[475] Suddenly, during the middle of a college football game, Colwell suffered a mental breakdown. He left the game, the team, and the university to return to Americus.[476] During the years that followed, Colwell grew more mentally ill, a victim of schizophrenia and manic depression, and isolated as jobs, friends, and his standing in the community slipped away. In 1996, Colwell decided to end his life by committing a murder for the purpose of being sentenced to death.[477] On July 20, 1996, he loitered in the parking lot of an Americus mall awaiting the appearance of a victim.[478] He allowed some persons of color to pass for lack of confidence that their murder would result in his capital prosecution.[479] Eventually, an elderly white couple appeared, and Colwell shot them to death.[480] Colwell then drove to the Americus police station where he surrendered and confessed to the shootings.[481]

Colwell pled guilty and sought to prevent his lawyer from presenting mitigating evidence to persuade the jury to impose a sentence other than death.[482] He insisted on testifying, and used the opportunity to demand a death sentence and threaten to kill again if they returned any other sentence.[483] The jury obliged Colwell.[484]

---

[473] E-mail from B. Michael Mears, Trial Counsel for Daniel Colwell, to Christopher Johnson, Professor of Law, Franklin Pierce Law School (February 17, 2005, 3:26:46 EST) (on file with author).

[474] *Id.*

[475] *Id.*

[476] *Id.*

[477] *Colwell*, 544 S.E.2d at 124. For evidence that the existence of the death penalty encourages some persons to commit crimes in order to receive that punishment, see White, *supra* note 205, at 874–75 (discussing cases of that kind).

[478] *Colwell*, 544 S.E.2d at 124.

[479] E-mail from B. Michael Mears, Trial Counsel for Daniel Colwell, to Christopher Johnson, Professor of Law, Franklin Pierce Law School (February 17, 2005, 3:26:46 EST) (on file with author).

[480] *Colwell*, 544 S.E.2d at 124.

[481] *Id.*

[482] *Id.*

[483] *Id.*

[484] *Id.* In 2002, Daniel Colwell took his own life in his death row cell. For further details of the case, see Cari Courtenay-Quirk, *Capital Punishment as Suicide: The Case of Daniel Colwell*, NEW ABOLITIONIST, Sept. 2003, http://www.nodeathpenalty.org/currentna/11_DanielColwell.html.

The choices made by Colwell and other capital defendants who obstruct the presentation of a defense pose a significant challenge to the integrity of the capital sentencing process. Allowing a defendant thus motivated to make decisions on behalf of the defense may result in a proceeding in which the jury does not hear compelling mitigating evidence. As a result, juries will return the "wrong" verdict if the accuracy of the verdict is evaluated, not by reference to the evidence actually presented in the courtroom, but rather by the reasonably available evidence that, but for the defendant's decisions, would have been presented. The Supreme Court's concern for a reliable correlation between the most severe penalty and the worst offenses and offenders is, in cases such as Colwell's, undermined by the inclusion among the ranks of the capitally sentenced those less culpable offenders who appeared to the jury to be the worst of the worst only because they engineered that appearance by their decisions.

A moment's reflection confirms that this problem, depicted above in perhaps its starkest manifestation, is in no way limited to capital punishment. Criminal defendants who deserve acquittal or conviction of a lesser offense may, by insisting upon unwise defense or tactics, be convicted on greater charges than the reasonably available evidence would warrant. The concern that courtroom results reflect external reality as accurately as possible does not vanish simply because the stakes in non–capital prosecutions are somewhat lower.

V. CONCLUSION

Pressed between the agonies of the self–inflicted injustice brought by the rule allocating choice to defendants and the painful silencing brought on by the rule allocating choice to lawyers, some authorities have thought to propose perfect solutions rendering everything to everybody. For example, Martin Sabelli and Stacey Leyton propose bifurcating trials that involve an unwelcome insanity defense to permit the lawyer's and the defendant's defense to be presented separately to the jury.[485] Christopher Slobogin and Amy Mashburn suggest imposing a heightened standard of competency where defendants would act against counsel's advice.[486] Others have suggested more complicated formulas for resolution, by which assignment of a decision to the defendant depends on whether his control over the

[485] Sabelli & Leyton, *supra* note 6, at 223–26.

[486] Slobogin & Mashburn, *supra* note 77, at 1596–97; *see also* Bonnie, *supra* note 71, at 579–80, 586–87.

decision may undermine a claim of actual innocence.[487]

I share that desire to escape the painful choice the law presents when deciding whether to give a decision to the lawyer or to the defendant. However, the possibility of resolving any substantial part of the difficulty by such means is doubtful. Fear of the expense of bifurcation and of defense opportunism seems likely always to influence courts against the possibility of trying cases twice. And, the wound to the defendant's dignity occasioned by the lawyer's choice would hardly seem to decrease just because there is a separate trial in which that wound is not inflicted.

The proposal allocating decisions to defendants with the protection of a heightened standard of competency alleviates the problem, but only by marginally reducing the number of defendants who can take actions against the advice of counsel. Defendants who pass the heightened standard would still retain the power to subvert the adversary process. If the standard were raised so high as to require the defendant's decision to be as reasonable as the lawyer's before the defendant could act on it, judges would be in the untenable position of having to arbitrate the merits of a decision disputed by lawyer and defendant.

Finally, those solutions that propose not to allow innocent defendants to make decisions subversive of the adversary process offer no workable rule. How is the judge to know, at the moment when a decision must be allocated, whether the defendant is probably innocent, especially in instances when "innocent" means only not guilty of the charged offense, though guilty of a lesser one?

In the end, I have made more of an apology for the proposed rule than the affirmative argument originally planned. I doubt, however, that anything more than apology is possible when fashioning the rules by which we judge and punish each other. Every course inflicts its distinctive damage, and participation in the system merely poses the choice of which sin to commit or which damage to cause. In *A Portrait of the Artist as a Young Man,* James Joyce puts in the mouth of Stephen Dedalus's father a toast that seems the fittest epitaph and ambition of the honorable criminal practitioner: "'And thanks be to God, Johnny,' said Mr. Dedalus, 'that we lived so long and did so little harm.'"[488]

In the balance of harms, the least damage is done by a rule committing

---

[487] Slobogin & Mashburn, *supra* note 77, at 1637 (stating that the lawyer should decide where the client is "clearly 'innocent' and is taking a position that will lead to a clearly less desirable disposition"); Uphoff, *supra* note 8, at 799 (stating that the lawyer should resolve disputes in favor of client, subject to four–factored analysis).

[488] JAMES JOYCE, A PORTRAIT OF THE ARTIST AS A YOUNG MAN 95 (Penguin Books 1976).

all decisions to the lawyer, with the exception of those decisions invoking or waiving the adversary process and those decisions involving the defendant's direct personal participation. So long as we rely on a system of adversary trials, and so long as prosecutors manage the government's case unhindered by the commitment of decisions to victims or other emotionally–invested laypeople, maintenance of the system's delicate partisan balance precludes giving to defendants any greater authority to decide.